No. 105, ORIGINAL

In The

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

ARTHUR L. LITTLEWORTH, Special Master

REPORT

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REPORT – PART II

REPORT OF SPECIAL MASTER RE
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STATE OF KANSAS, Plaintiff,	)	No. 105, Original
v.	)	October Term, 1985
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REPORT OF SPECIAL MASTER RE WINTER STORAGE MOTIONS

(Filed Sept. 15, 1989)

Colorado has filed several motions concerning the so-called winter storage program. These consist of a Motion for Partial Summary Judgment on the 1951 Resolution, a Motion to Stay Review of Kansas' Claim of Injury from the Winter Storage Program, and Motions to Strike Portions of the Affidavits of Douglas R. Littlefield, Ph.D. and Carl E. Bentrup filed on behalf of Kansas. In support of these motions, Colorado has submitted several affidavits and four large volumes of accompanying documents. Many date back to the events leading up to the adoption of the Arkansas River Compact in 1949. The United States, now having intervened in this case, also filed a brief in support of Colorado's Motion for Partial Summary Judgment. Kansas, in reply, filed three volumes of additional documents, together with the Littlefield and Bentrup Affidavits. All parties agreed that these motions could be decided by the Special Master without oral argument.

Colorado's Motion for Partial Summary Judgment

In its Complaint Kansas contends, among other allegations, that any reregulation of the native waters of the Arkansas River must be approved by the Compact Administration, pursuant to a Resolution adopted by the Compact Administration on July 24, 1951 (hereinafter the "1951 Resolution"). Colorado seeks a determination through its Motion for Partial Summary Judgment that such approval by the Compact Administration is not legally required.

The issues arise out of the winter storage program in Pueblo Reservoir, a part of the Fryingpan-Arkansas Project authorized by Congress in 1962. 43 U.S.C. §§ 616-616f (1962). Pueblo Dam is located on the mainstem of the Arkansas River approximately six miles west of the City of Pueblo, Colorado, and is owned and operated by the United States, through the Bureau of Reclamation. The Fryingpan-Arkansas Project brings water from the Colorado River Basin west of the Continental Divide into the Arkansas River Valley of Eastern Colorado, storing such water in Pueblo Reservoir. In addition, Pueblo Reservoir provides storage space for the reregulation of private water rights. This reregulation involves the storage of "native" waters of the Arkansas River which were historically diverted by water users in Colorado for irrigation use during the winter months, but which now are stored for later release during the months of peak crop demand (hereinafter the "winter storage program").

The 1951 Resolution consisted of certain "comments and recommendations" made by the Compact Administration to the Governors of Colorado and Kansas with

respect to the then proposed Fryingpan-Arkansas Project.[1] The Resolution sets out the Compact Administration's understanding of the proposed project, namely, that approximately 70,000 acre-feet of water a year would be imported from the Colorado River Basin into the Arkansas River Basin for supplemental irrigation and domestic water supplies in Colorado; and further, that the project would involve the reregulation of native waters of the Arkansas River. Noting its concern over the reregulation of native waters, the Compact Administration recommended to the Governors of Colorado and Kansas, "and expressed as a policy of the Arkansas River Compact Administration," that the proposed Federal project be approved, but on the condition that there would be no reregulation of native waters of the Arkansas River until a plan therefor had been submitted to, "and approved by," the Arkansas River Compact Administration and the affected water users. The full text of the 1951 Resolution is attached to this Report.

Colorado's argument on its Motion for Partial Summary Judgment begins with an analysis of the Arkansas River Compact, and the powers granted therein to the Compact Administration. The Compact was approved by Congress in 1949, and is now a law of the United States. 63 Stat. 145 (1949); *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). The

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[1] At that time the project was known as the "Gunnison-Arkansas Project, Roaring Fork Diversion." The Gunnison-Arkansas Project was ultimately scaled down, and the Roaring Fork Diversion Unit was renamed the Fryingpan-Arkansas Project, and authorized for construction in 1962.

Compact Administration can exercise only those powers provided in the Compact ratified by Kansas and Colorado, and approved by Congress under the Compact Clause of the United States Constitution. The Compact Administration cannot, by its own action, expand its powers; nor can a court order relief inconsistent with the express terms of the Compact. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Colorado maintains that the Compact Administration never had, and was never intended to have, the power to require its approval of any reregulation of the native waters of the Arkansas River. Specifically at issue now is the winter storage program in Pueblo Reservoir, a Federal facility. The practical question is whether the winter storage program can be implemented without the prior approval of the Compact Administration. The United States supports Colorado in the view that the express language of the Compact demonstrates that it was not intended to impede the implementation of Federal projects. Presumably, however, both Colorado and the United States agree that the Compact Administration has the authority to *investigate* any impact that the winter storage program might have on Kansas' entitlement under the Compact. Moreover, any future development or program must be consistent with the substantive requirement in the Compact that the waters of the Arkansas River ". . . shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas. . . ." Arkansas River Compact, Ch. 79, 59 Stat. 53, Article IV-D.

Colorado points initially to Article VI-A(2), which provides:

> "Except as otherwise provided, nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas river in said State as decreed to said appropriators by the courts of Colorado . . . nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River."

Colorado argues that any requirement that the Compact Administration must approve the reregulation of native waters would, in fact, supplant Colorado's water rights administration in contravention of this Article.

Article IV-D of the Compact is also cited in support of Colorado's motion. It provides:

> "This Compact is not intended to impede or prevent future beneficial development of the Arkansas River Basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve the construction of dams, reservoirs and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction."

Finally, Colorado relies on Article VIII-H, arguing that the enforcement authority of the Compact Administration is limited to making investigations, findings, and recommendations; and that the Administration was not delegated authority to enforce the proviso of Article IV-D by requiring its prior approval of future development or construction. Article VIII-H provides:

> "Violation of any of the provisions of this Compact or other actions prejudicial thereto which come to the attention of the Administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the Administration may report its findings and recommendations to the State official who is charged with the administration of the water rights for appropriate action, it being the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights."

Kansas properly points out that this provision deals only with a "violation" of the Compact, and it is the position of Kansas that the Administration has the right of approval in order to *prevent* Compact violations. Nonetheless, Article VIII-H, coupled with the requirement that any action by the Compact Administration be approved by the representatives of both States, underscores the limited direct enforcement powers of the Compact Administration.[2]

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[2] The history of the Compact negotiations shows a successive weakening of the powers originally proposed for the Compact Administration. For example, early proposals would have

Viewing all of these provisions, the United States concludes:

> "Taken together, these Compact Provisions confirm that the Compact parties did not give the Compact Administration the authority to block the implementation of programs like the winter storage program by withholding its approval of the necessary operating principles. Instead, the Compact clearly contemplates that the Compact Administration will play only an investigatory role, to determine whether projects like the winter storage program at Pueblo Reservoir, comply with the provisions of the Compact." Response of the United States to Colorado's Motion for Partial Summary Judgment and Colorado's Motion to Stay at 15.

All parties, however, go beyond the provisions of the Compact itself. Both Colorado and Kansas review the extensive documentary record of the negotiations leading to final approval of the Arkansas River Compact. The authority to negotiate such a Compact was granted by Congress in 1945, subject to the condition that a person appointed by the President participate as a representative of the United States. Arkansas River Compact, Ch. 79, 59 Stat. 53. The United States Representative was General

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made Administration findings of fact conclusive in subsequent court proceedings, and would also have allowed the Administration to institute appropriate legal action in the event the States failed to act. Record, Colorado-Kansas Arkansas River Compact Commission at 15-25; 15-46-47. Both of these powers were finally dropped. Record, *id.* at 15-58; 17-83-84. Kansas says that Article VIII was "gutted" of any real enforcement provisions. Kansas' Response to Colorado's Motion for Partial Summary Judgment at 22.

Hans Kramer, U.S. Army Corps of Engineers, (Ret.), and he was elected Chairman of the negotiating Commission. Both States rely upon such documentary evidence to help establish intent. When the interpretation of a Compact is at issue, the record of the negotiations may be used to ascertain the meaning intended by the parties. *See Texas v. New Mexico*, 462 U.S. 554, 568 n. 14 (1983); *Arizona v. California*, 292 U.S. 341, 359-60 (1934).

Although the Fryingpan-Arkansas Project was not approved by Congress until 1962, both States acknowledge that the forerunner of the Project (under the name of the Gunnison-Arkansas Project) was being investigated at the same time that the Arkansas River Compact was being negotiated. Colorado's Brief at 37; Kansas' Response at 11. Indeed, the Project was specifically discussed during those negotiations.

The Special Master has studied the voluminous record of the Compact negotiations submitted by both States, and concludes that the record does not support Kansas' claim that the Compact negotiators intended to vest the Compact Administration with ". . . the authority to approve or disapprove any future federal development that might undermine the status quo as established by the Compact." Kansas' Response at 34. Indeed, specific reference to a right of "approval" does not appear anywhere in the historical record.[3] Although Kansas claims that

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[3] It is interesting that the affidavit of Douglas R. Littlefield, Ph.D., the historian retained by Kansas, speaks only of the right to "review and comment" on plans for the reregulation of native waters of the Arkansas River, and not the right of approval which Kansas claims was intended by the Compact negotiators. Kansas' Response at 2.

such authority may be "implied" (*id.* at 30), nothing in the record supports a conclusion that the Compact Administration was intended to have greater authority than is evident from the Compact itself. The powers of the Compact Administration were carefully circumscribed.

Kansas argues that the Colorado motion puts the "intent of the parties" at issue. Perhaps, therefore, the most expeditious way to address the issue is first to review the documentary evidence on which Kansas relies.

Kansas claims that the original version of the present Article IV-D was intended ". . . to provide the Compact Administration with the express authority to review future proposals and plans under the terms of the Flood Control Act of 1944," and this was the means ". . . to ensure that future developments would have to be approved by the Compact Administration." *Id.* at 36-37. General Kramer did, in fact, draft a provision that would have incorporated the policy and procedure set forth in Section 1 of the Flood Control Act of 1944 into the Compact. Flood Control Act of 1944, Ch. 665, 58 Stat. 887. He sent the draft to Colorado Commissioner Henry C. Vidal, Chairman of the Commission's Legal Affairs Committee, under a covering letter dated September 30, 1946, which stated in part:

> "As you know, we have had some discussions in previous meetings of the Colorado-Kansas Arkansas River Compact Commission regarding compact provisions with respect to future plans and projects affecting the waters of the Arkansas River which may be developed by the War Department or by the Department of the Interior. I advanced the thought at one of

> our meetings that the compact might meet this situation by including a clause whereby the coordinating procedure between Federal Departments and affected States established in the Flood Control Act of December 22, 1944, would be extended in application to the body to be established for administering the Arkansas River Compact." Kansas' Response to Colorado's Motion to Stay and Motion for Partial Summary Judgment, Exhibit 110.

The actual draft language prepared by General Kramer notes that under the Flood Control Act of 1944 the Federal agencies were required ". . . to submit plans, proposals or reports to the affected State or States." *Id.* The reference to that Act was intended to have ". . . the effect of requiring such submittal also to the Arkansas River Compact Administration in the case of any investigation, plan, proposal or report which may affect the waters of the Arkansas River or any provision of this Compact." *Id.* Significantly, General Kramer did not propose that Federal plans could not proceed unless *approved* by the Compact Administration. The statement in the Kansas brief that the Kramer draft required all future Federal plans to be submitted "for approval" overstates the plain provisions of the Kramer document. Kansas' Response at 13.

General Kramer's draft provision was not incorporated into the Compact. However, at least one later proposed Compact Article, numbered XI, also made express reference to the Flood Control Act of 1944. Kansas' Response, Exhibit 112 at 4-6. The reference in the draft Article, however, appears to be more concerned with the so-called "paramountcy" issue than with any requirement

of submitting Federal plans to the Compact Administration. The paramountcy clause in the Flood Control Act of 1944, as applied to the Arkansas River, would have made navigation and power subservient to irrigation use. The proposed Article XI draft brought opposition from the Federal Power Commission. As Kansas acknowledges, a "watered-down version" of Article XI was then proposed which stripped the Article of any reference to specific Federal statutes, Kansas' Response at 14. But even the revised Article XI was objected to by both the War Department and the Department of Interior. Kansas acknowledges that this opposition forced the deletion of both the proposed Articles X and XI from the Compact draft. *Id.* at 16, 38-39.

Thus, none of the draft provisions on which Kansas relies were finally included in the Compact. Kansas says the Compact negotiators finally "agreed to rely on the provisions of existing federal law" in relation to future developments on the river. But even if this argument is accepted, the law did not provide that the affected States, or the Compact Administration, would have the power of approval over the construction or operation of Federal projects. The Flood Control Act of 1944 provides only that Federal plans and proposals will be submitted to "affected states" for their "views and recommendations," and that such "views and recommendations" will be included among the documents submitted to Congress. Flood Control Act of 1944, Ch. 665, § 1(a) and (c), 58 Stat. 887. It does not give any State the power to approve or disapprove Federal projects.

In its brief, Kansas slips back and forth between two differing statements of its position. At times, Kansas states that the Compact Administration was intended to have the authority to require the "submission" of plans for Federal projects; that the Administration wanted "an official say" concerning future plans for the reregulation of native waters, "even if that say was channeled through the governors of Kansas and Colorado." Kansas' Response at 9, 16, 30, 33. In other places, Kansas states that a right of "approval" was intended. Kansas' Response at 12-13, 34-35, 37, 41. When using "approval," the Special Master understands Kansas' position to be that any project involving the reregulation of the waters of the Arkansas River cannot proceed without the approval of the Compact Administration. The 1951 Resolution says there shall be no reregulation of native waters "until" a plan of operation has been "submitted to, and approved by," the Compact Administration. In 1985 the Kansas Attorney General confirmed Kansas' position that the 1951 Resolution was a bilateral decision precluding reregulation of the native waters of the Arkansas River "until a plan of operation had been approved by the Administration." Colorado's Motion for Partial Summary Judgment on the 1951 Resolution, Exhibit 27 at 5-6.

Clearly there is a difference between merely requiring Federal plans to be submitted to the Administration, and giving that Administration a veto power over the construction or operation of such projects. At best, the historical record suggests that some Compact negotiators wanted, and perhaps expected, that plans for future Federal development would be submitted not only to the affected States, but also to the Compact Administration.

However, the historical record does not support Kansas' claim that the Compact negotiators intended to give the Compact Administration power to control future Federal operations on the Arkansas River.[4]

The 1951 Resolution, adopted two years after the approval of the Arkansas River Compact, did not assert that the Compact Administration already possessed independent authority over the Fryingpan-Arkansas Project. Rather, that Resolution was framed merely in the form of a recommendation to the Governors of Kansas and Colorado. The 1951 Resolution came about in response to the Feasibility Report on the Fryingpan-Arkansas project issued by the Bureau of Reclamation. In 1951, that report was transmitted by the Secretary of the Interior to Kansas and Colorado for their written views and recommendations as required by Section 1(c) of the Flood Control Act of 1944. *Id.*, Exhibit 62. At the request of its Chairman, the Compact Administration was also furnished a copy. *Id.*, Exhibit 69 at 3. The Compact Administration composed its comments in the form of the 1951 Resolution, and asked the Governors of Colorado and Kansas to transmit

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[4] In his report to Congress on the proposed Compact, General Kramer made only the following modest statement with respect to future Federal plans: "It is to be presumed that the Federal agencies will respect the above provisions as a matter of course in their development plans for the Arkansas River basin. It is also presumed by the compact negotiators that when such plans are submitted to the Governors of the affected States, pursuant to the provisions of the Flood Control Act of December 22, 1944, the Governors of Colorado and Kansas will be especially mindful of the protective provisions of Article IV-D in formulating their official views and recommendations." Colorado's Motion, Exhibit 59 at 41; *id.*, Exhibit 60 at 36.

it to the Secretary of Interior, along with their respective State's comments and recommendations. This was done. The Secretary of Interior then transmitted the Feasibility Report, and all comments thereon, to Congress to secure authorization and funding for the project. The Secretary did not, however, recommend adoption of the policy included in the 1951 Resolution. H.R. Doc. No. 187, 83rd Cong., 1st Sess. 9-13 (1953).

The submittal made by the Governor of Kansas on the Fryingpan-Arkansas Project expressed his State's concern that reregulation of native waters not be "detrimental" to Kansas, but the Governor made no reference to approval by the Compact Administration for such protection. Instead, he stated only that:

> "We assume, of course, that no such attempt at re-regulation would be made or desired without a meeting of the two states and the United States after completion of the project." Colorado's Motion, Exhibit 62.

The Fryingpan-Arkansas project was not actually authorized by Congress until 1962. The authorizing legislation does not include any provision that the reregulation of the native waters of the Arkansas River be subject to the approval of the Compact Administration. The legislation simply directed the Secretary of the Interior "to construct, operate, and maintain the Fryingpan-Arkansas project Colorado, in substantial accordance with the engineering plans therefor set forth in House Document No. 187, Eighty-Third Congress . . ." 42 U.S.C. §§ 616-616f. The water supply plans and estimated project revenues were based on storage of winter flows in Pueblo Reservoir. H.R. Doc. No. 187 at 32, ¶65; *id.* at 35, ¶70.

Kansas argues, nonetheless, that congressional approval of the project followed "Colorado's assurances" that any reregulation of native waters would be subject to approval of the Compact Administration "as demanded by Kansas." Kansas' Response at 48. The record shows that Representative Avery of Kansas read a letter from the Kansas Water Resources Board referring to the substance of the 1951 Resolution, and concluding that Kansas therefore ". . . assumes that any reregulation of the native waters will be subject to the approval of the compact administration." 108 CONG. REC. 8, 10144 (1962). On the floor of the House, the following exchange then occurred between Representative Avery and Representative Aspinall of Colorado:

> "MR. AVERY. I would like to have the assurance of the chairman of the committee that if this bill is to pass and the project is to be authorized that all management of what is described as 'native water in the Arkansas River' will be submitted for approval by the Kansas-Colorado-Arkansas River Compact Administration.
>
> "MR. ASPINALL. I would answer the gentleman this way: The Fryingpan-Arkansas project has the unanimous consent of the Arkansas River Compact Administration, and the Arkansas River Compact Administration has a representative from Kansas. So the answer is 'Yes,' native waters will be treated as they are supposed to be treated in compliance with the Arkansas River compact." *Id.*

The Aspinall response, however, is hardly as direct or unambiguous as Kansas claims. Certainly it is less than a

clear affirmation that native waters would not be reregulated in the Fryingpan-Arkansas project without the prior approval of the Compact Administration. Colorado also points out that Representative Aspinall was not an officer or agent of the State of Colorado, and in the Committee hearings, the official State position was presented by the Director of the Colorado Water Conservation Board. Colorado's Reply at 49; *Hearings on H.R. 2206, 2207, 2208 and 2209 Before the Subcomm. on Irrigation and Reclamation of House Comm. on Interior and Insular Affairs*, 87th Cong., 1st Sess. 148 (1961).

Moreover, Kansas does not include the response of Representative Rogers of Colorado which was even more equivocal:

> "Further answering the gentleman's question, and emphasizing what the gentleman from Colorado [Aspinall] has said, the gentleman from Kansas [Avery] recognized that there is a compact between the State of Colorado and the State of Kansas which everybody has agreed works perfectly. The enactment of this legislation will not change that situation in any manner whatsoever." 108 CONG. REC. 8, 10145 (1962).

More important, however, such a brief exchange, without consideration of the views of the committee or the affected Federal agencies, hardly seems adequate to establish the intent of Congress on an important Federal issue.[5] Kansas cites *West Virginia ex rel. Dyer v. Sims*, 341

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[5] For example, Kansas does not consider H.R. Doc. No. 694. In describing the project, the Document refers specifically to ". . . the regulation of winter flows amounting to 88,000 acre

U.S. 22 (1951), for the proposition that Colorado should be estopped by the Aspinall statement. But that case was based on a covenant made by the state legislature, not on a response by an individual congressman. Remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. *Chrysler v. Brown*, 441 U.S. 281, 312 (1979); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). Statements by individual legislators should generally be given little weight when searching for the intent of the entire legislative body. *National Welfare Rights Organization v. Mathews*, 533 F.2d 637, 642-43 (D.C. Cir. 1976); *Castaneda-Gonzalez v. Immigration & Nat. Service*, 564 F.2d 417, 424 (D.C. Cir. 1977). Moreover, had the issue been fully aired, it seems unlikely that Congress would have placed part of the operation of a Federal project in the hands of an administrative body that might be incapable of taking action because of the unanimous consent requirement in the Compact.

The later conduct of the Compact Administration confirms the view that it did not have the power to require prior approval of the winter storage program. Construction of Pueblo Reservoir was completed in 1975 and the first winter storage program was begun that year. Colorado's Motion, Exhibit 55 at ¶5. A winter storage program has been operated in Pueblo Reservoir every

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feet. . . ." H.R. Doc. No. 694 at 4. It states further that the project will be operated ". . . in accordance with the 'operating principles' set out in H.R. Document 130 of the 87th Congress." *Id.* at 12. In turn, House Document 130 sets forth the operating principles adopted by the State of Colorado on April 30, 1959. These operating principles do not include Compact Administration approval of a winter storage program.

winter since that time, with the exception of the winter of 1977-78. *Id.* at ¶12. Kansas admits that it did not raise the 1951 Resolution until 1982. Kansas' Response at 23.

Kansas tries to explain its delay, and the inaction of the Compact Administration, by stating that the winter storage program was referred to in minutes, and by speakers at various meetings, as "experimental," "provisional," and "temporary." Kansas' Response at 23-25. But it might have been expected that the Compact Administration, if it truly had the power, would have wanted to approve the program at its outset. Indeed, its interest might even have been heightened if the program were experimental and its impacts uncertain. Furthermore, the 1951 Resolution does not make any exceptions for experimental programs. It refers to *any* reregulation of the native waters of the Arkansas River.

The initial operating plan for the winter storage program was developed by the Southeastern Colorado Water Conservancy District ("Southeastern District") and the participating water users with the assistance of the Bureau of Reclamation, the U.S. Geological Survey, and Colorado water officials. Colorado's Motion, Exhibit 55 at ¶¶9, 10. A repayment contract between the Southeastern District and the United States for winter storage in Pueblo Reservoir was signed in 1965. *Id.*, Exhibit 67; *id.*, Exhibit 55 at ¶¶5, 45. Meetings to develop the winter storage program began in 1969 between representatives of the Southeastern District and Colorado water users in the Arkansas Valley. *Id.*, Exhibit 55 at ¶¶9, 11. The program, with the assistance of the Bureau of Reclamation, the U.S. Geological Survey, and the Colorado Division Engineer, was finalized in 1975. *Id.*, Exhibit 55 at ¶¶11

and 14. Following agreement on an operating plan, the negotiating committee was reformulated as the Board of Trustees of the Winter Storage Program. *Id.*, Exhibit 55 at ¶14.

The Chairman of the Winter Storage Committee of the Southeastern District, and later the Chairman of the Board of Trustees of the program, was Charles L. ("Tommy") Thomson, General Manager of the Southeastern District. He appeared at several meetings of the Compact Administration from 1970 to 1975, at which he discussed the planning for the winter storage program. *Id.*, Exhibit 55 at ¶10. He then appeared at the December, 1975, annual meeting of the Compact Administration, and advised the Administration of the start of the winter storage program. *Id.*, Exhibit 55 at ¶¶16, 17; *Id.*, Exhibit 71 at 7. No objection to the commencement of the program was raised either by the Compact Administration or Kansas. *Id.*, Exhibit 55 at ¶17. Nor was there any mention of the 1951 Resolution, or the right of the Compact Administration to approve the program before it was implemented.

Instead, the Compact Administration merely adopted a Resolution directing its Special Engineering Committee to review the operations of the Fryingpan-Arkansas Project, and to report to the Compact Administration at each annual meeting on the relationship between the project and the Arkansas River Compact. *Id.*, Exhibit 55 at ¶19; *id.*, Exhibit 71 at 8. Mr. Thomson was also requested to appear at the next meeting of the Compact Administration to report on the results of the program, and he did this in May, 1976. *Id.*, Exhibit 55 at ¶21; *id.*, Exhibit 72 at 5-9. Beginning in 1975, the Secretary of the Compact

Administration began attending the meetings of the Board of Trustees of the Winter Storage Program, and in 1977, Mr. Carl Bentrup, one of Kansas' Representatives, was appointed to represent the Compact Administration at these meetings. *Id.*, Exhibit 55 at ¶20; *id.*, Exhibit 77 at 54-55.

The actions of the Compact Administration over many years are hardly consistent with a view that the Administration's approval was required before the winter storage program could be implemented. On the contrary, the Administration's conduct supports Colorado's and the United States' views, namely, that the Administration's authority was limited to monitoring and investigating any impact that the winter storage program might have on Kansas' entitlement under the Compact. Any violations of the Compact would be subject to Article VIII.

Given the Special Master's conclusions on the authority of the Compact Administration, it is not necessary to rule on Colorado's additional grounds for its motion; namely, that the 1951 Resolution was modified and superseded, and that Kansas should be precluded from attempting to enforce the policy expressed in the 1951 Resolution on the grounds of laches, estoppel and equitable principles of fair dealing. Colorado maintains that Kansas has accepted the benefits of the winter storage program. Kansas denies these allegations.

Apart from the substantive issues, Kansas also argues that summary judgment on this motion is inappropriate for three reasons: (1) that genuine issues of material fact exist; (2) that summary judgment is strongly disfavored

for resolving questions of intent, such as exist with respect to the 1951 Resolution; and (3) that summary judgment is disfavored for deciding questions in complex litigation.

The fundamental question here involves the powers of the Compact Administration. That is a question of the statutory interpretation of the Arkansas River Compact and the Federal legislation authorizing the Fryingpan-Arkansas Project. Volumes of documentary history have been submitted to aid in such interpretation. While the conclusions to be drawn from this record are certainly at issue, there do not appear to be material issues of fact. Matters of statutory interpretation and application present issues of law, not fact, and in the final analysis, it is ". . . the province and duty of the judicial department to say what the law is." *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (quoting *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1801)); *see also Fed. Election Comm'n. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981); *State of Cal. ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm.*, 877 F.2d 743, 745-46 (9th Cir. 1989). Particularly is this true with respect to interstate compacts. In *Texas v. New Mexico*, 462 U.S. 554 (1983), for example, the Supreme Court recognized that:

> "If there is a compact, it is a law of the United States . . . and our first and last order of business is interpreting the compact." 462 U.S. at 567-568.

There is no indication that documentary evidence not already presented with this motion, or other admissible non-documentary evidence on the issue, would be offered at trial. Kansas has presented two affidavits in

support of its argument that material issues of fact are in dispute. Colorado has moved to strike the crucial portions of these affidavits, but apart from the Special Master's ruling on that motion, these affidavits do not demonstrate material factual issues concerning the matters decided in this Report.

It is evident from the affidavit of the historian, Dr. Littlefield, that he has undertaken the same kind of examination of source documents that would ordinarily be made by a court for purposes of determining legislative or administrative intent. The events recited in Dr. Littlefield's affidavit are simply part of the historical record available to the Court for its review. The interpretation given by Dr. Littlefield to those actions are his own conclusions, not facts, drawn from the historical record, and cannot supplant the interpretation which ultimately is within the power of the Court to make. The conclusions in the Littlefield affidavit are actually more guarded than Kansas sometimes claims. Nonetheless, and even if the affidavit were to be considered, the Special Master reaches different conclusions based on his review of the historical record.

The affidavit of Carl E. Bentrup indicates that he has been a Kansas Commissioner on the Arkansas River Compact Administration since June 7, 1957. He testifies about what the "parties intended" in the 1951 Resolution, and what was "understood by all concerned." However, from the affidavit itself, it appears that his conclusions came from conversations with two of the first Commissioners. Other portions of his affidavit are factual and based on personal knowledge, but appear to relate to Colorado's allegations of laches and estoppel. Those

issues are not necessary to a resolution of Colorado's motion.

Citing Professor Moore, Kansas also asserts that summary judgment is disfavored for resolving questions of intent. Kansas' Response at 28. However, Moore clearly states that summary judgment is proper when there are no triable issues of fact and the moving party is entitled to summary judgment as a matter of law. 6 J. Moore & J. Wicker, *Moore's Federal Practice*, ¶56.17 (2d. ed. 1981). Summary judgment provides an appropriate mechanism for resolving legal questions of statutory and regulatory construction. *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1066 (Temp. Emer. Ct. App. 1978); *Mobil Oil Corp. v. Federal Energy Administration*, 560 F.2d 87 (Temp. Emer. Ct. App. 1977).

Finally, Kansas contends that partial summary judgment should be denied because the present case constitutes "complex litigation." Kansas' Response at 29. Kansas relies on Justice Jackson's opinion for the Court in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). That decision was based, in part, on the need for "a more solid basis of findings based on litigation." 334 U.S. at 257. However, there is no indication here that the evidence at trial on the issue now decided would be different than the record now before the Special Master. Most courts have recognized that if the decision rests upon an issue of law, the fact that it is complex or poses difficult problems of interpretation or application should not stand in the way of a summary judgment motion, if there is no triable issue of fact. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2732, at 304-307, citations omitted. Only a narrow legal issue, albeit important, has been

decided in this motion. The factual issues concerning any impact of the winter storage program on Kansas' entitlement under the Compact are reserved for trial.

Accordingly, the Special Master recommends that the Colorado Motion for Partial Summary Judgment on the 1951 Resolution be granted.

Colorado's Motion to Strike Affidavit Testimony of Douglas R. Littlefield and Carl E. Bentrup

Colorado has moved, pursuant to Rule 56, to strike Paragraphs 5-11 of the Affidavit of Douglas R. Littlefield, Ph.D., and Paragraphs 4-6 and 10 (last sentence) of the Affidavit of Carl E. Bentrup. The Special Master grants this motion.

Mr. Bentrup testifies in his affidavit as to the intent of the Compact Administration in 1951 when it adopted the 1951 Resolution. This was six years before Mr. Bentrup became a Commissioner on the Arkansas River Compact Administration. The affidavit indicates on its face that his knowledge came from conversations with two of the first Commissioners. Apart from the basic difficulty of determining the intent of a legislative or administrative body in this fashion, Mr. Bentrup's testimony is clearly based on hearsay. It is not admissible under Rule 56(e). *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir. 1987); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 556 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Maiorana v. MacDonald*, 596 F.2d 1072, 1080 (1st Cir. 1979). Even the post-enactment statements of those legislators actually involved in the enactment process have no probative weight. *Bread Political Action Committee v. Federal Election*

Commission, 455 U.S. 577, 581-84 (1982); *Petry v. Block*, 697 F.2d 1169, 1171 (D.C. Cir. 1983).

Both Dr. Littlefield and Mr. Bentrup testify as to issues of intent – of the Arkansas River Compact negotiators, of various Federal agencies, of Congress, and of the States of Kansas and Colorado. Such intent, to the extent relevant, involves interpretation of the Arkansas River Compact, the Fryingpan-Arkansas legislation, and the 1951 Resolution. The interpretation of such statutory and administrative action presents questions of law, to be decided by the Court. *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980); *United States v. Montoya*, 827 F.2d 143, 146 (7th Cir. 1987); *Union Pacific Land Resources Corp. v. Moench Inv. Co., Ltd.*, 696 F.2d 88, 93 n. 5 (10th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 279 (1959).

Dr. Littlefield's testimony is based upon his review of primary historical documents, and represents his conclusions rather than factual evidence not otherwise available to the Court. Opinion testimony providing legal conclusions is not admissible. *Van Winkle & Co. v. Crowell*, 146 U.S. 42, 49 (1892); *United States v. Scop*, 846 F.2d 135, 139-42 (2d Cir. 1988); *United States v. Curtis*, 782 F.2d 583, 599 (6th Cir. 1986); *United States v. Zipkin*, 729 F.2d 384, 386-87 (6th Cir. 1984); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 239-40 (5th Cir. 1983); *Marx & Co., Inc. v. The Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977), *cert. denied*, 434 U.S. 861 (1977). In a supplemental brief, Kansas has made available the decision of the Special Master in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Tenth Memorandum of Special Master. From the material presented,

however, it appears that the affidavits involved in that decision are distinguishable from those here.

Kansas argues that the 1951 Resolution was not a legislative enactment, but rather a "bilateral agreement between two parties" that should be analyzed under contract law. Kansas' Response at 3. It is not clear that applying contract law would save either of these affidavits, but the Special Master does not agree that the 1951 Resolution represents such an agreement. It was simply a resolution adopted by the Arkansas River Compact Administration, an interstate agency, which set forth its findings of fact, comments, and recommendations to the Governors of Kansas and Colorado on the Feasibility Report for the Fryingpan-Arkansas Project. It was a policy statement by an administrative agency, not an agreement between the States of Kansas and Colorado. The Compact Administration is "a body outside the State" which has been granted, by the Compact, a "reasonable and carefully limited delegation of power." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30-31 (1951). There is no question about what the 1951 Resolution states. However, the legal right of approval over the reregulation of native waters of the Arkansas River cannot come from the Resolution. Any such authority must derive from the Compact or the authorizing legislation for the Fryingpan-Arkansas Project. The Special Master concludes that the Compact Administration was not vested with such authority.

Colorado's Motion to Stay Review of Kansas' Claim of Injury from the Winter Storage Program

Colorado's earlier motions dealt with a discrete legal issue, i.e., the authority of the Compact Administration to approve the winter storage program. Now Colorado turns to the actual impact, if any, of the winter storage program on Kansas' entitlement. Colorado moves that the Special Master not review at this time any complaint by Kansas that the operation of the winter storage program has materially depleted the waters of the Arkansas River in violation of the Compact. The ground for the motion is that Kansas has failed to make a reasonable effort[1] to exhaust its administrative remedies with regard to any claim of injury from the operation of the winter storage program. Colorado maintains that Kansas should be required first to pursue any factual claim of injury through the Compact Administration.

It is evident that any earlier action by the Compact Administration concerning the winter storage program was at least impeded, and perhaps blocked, by the legal disagreement between the States over the 1951 Resolution. However, that legal issue having now been decided, it does not necessarily follow that the question of injury from the program should be returned to the Compact Administration for its investigation.

Colorado supports its motion with a lengthy statement of facts which it claims are not in dispute. Colorado's Motion at 3-28. According to Colorado, these "facts" show that Colorado has always supported a review of the winter storage program by the Compact Administration (*id.* at 31-32); that although Kansas

alleged injury from the winter storage program in February, 1985, its "real interest" was enforcing adherence to its interpretation of the 1951 Resolution (*id.* at 34); that by withholding the Spronk report, Kansas did not "fairly" pursue the 1985 investigation authorized by the Compact Administration (*id.* at 32-33); that on more than one occasion Kansas vetoed Administration action because Colorado would not agree on the 1951 Resolution (*id.* at 33); that various studies from 1975 to 1981 showed no reduction in inflows to the downstream John Martin Reservoir resulting from the winter storage program (*id.* at 34); and that Kansas has actually benefited, and has continued to accept those benefits, from the winter storage program. *Id.* at 34. It is sufficient to note here that these conclusions, and many of the facts stated by Colorado, are vigorously disputed by Kansas. However, a resolution of these factual issues is not required to decide this motion, and if such issues prove to be relevant, they are better decided at trial.

The parties do agree, nonetheless, that the Compact Administration decided in March, 1985, to investigate the operation of Pueblo Reservoir and the winter storage program. Colorado's Motion, Exhibit 28 at 3. Further, the record shows that both States submitted reports as part of that investigation, and that the reports reached conflicting conclusions about the effect of a winter storage program. *Id.*, Exhibit 47 at 22; *id.*, Exhibit 36 at 21. The Compact Administration, accordingly, was authorized to proceed only in other areas upon which there was mutual agreement. *Id.*, Exhibit 37 at 34-38. Under these circumstances, it appears that reasonable efforts were made

before the Compact Administration. It is also worth noting that some of the matters complained of by Colorado occurred after the Kansas complaint was filed.

Finally, the Special Master believes that a practical approach must be taken toward this motion. The Compact Administration can act only by unanimous vote of the representatives of the two States. Arkansas River Compact at Article VIII-D. It is not realistic, while this lawsuit is pending, to expect that these representatives will agree on the question of whether the winter storage program injures or benefits Kansas, or whether a Compact violation has occurred.

Colorado properly points out that the Kansas complaint does not specifically allege injury from the winter storage program. Rather, the express reference in the complaint is to Colorado's alleged unilateral rejection of the 1951 Resolution. However, the complaint does allege generally that the State of Colorado and its water users have materially depleted the usable and available stateline flows of the Arkansas River since the adoption of the Compact. Colorado acknowledges that it has been on notice since at least March, 1986, that Kansas intended to assert injury from the winter storage program. Colorado's motion at 24. The Special Master believes that the pleadings are broad enough to embrace this issue. Indeed, if the Special Master is to try the issue of whether stateline flows have been materially depleted in violation of the Compact, all possible causes should be considered. One possible cause should not be reserved to investigation by the Compact Administration, while the Special Master tries the basic issue and considers all other possible causes.

Accordingly, the Special Master denies Colorado's Motion to Stay.

DATE: September 15, 1989

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

1951 Compact Administration Resolution

WHEREAS the Arkansas River Compact Administration, an official interstate body created by the Arkansas River Compact and charged with the administration of such compact, is interested in the proposed development to the extent that its construction and operation shall not interfere with the rights, interests and obligations of Colorado and Kansas under the Compact;

NOW BE IT RESOLVED by the Arkansas River Compact Administration that the following comments and recommendations relating to said report of the Secretary of Interior, to wit:

> The Arkansas River Compact Administration submits these comments and recommendations to the Governors of Colorado and Kansas respecting the proposed Initial Development, Gunnison-Arkansas Project, Roaring Fork Diversion, Colorado, namely:
>
> 1. The Administration understands that the project plan proposes:
>
> (a) The importation by appropriate project works of approximately 70,000 acre-feet of water a year from the Colorado River Basin to the Arkansas River Basin for supplemental irrigation and domestic water supplies in Colorado and for the production of hydroelectric energy.
>
> (b) In connection with such importation of water and its regulation in the Arkansas River Valley by project works, the re-regulation of native waters of the Arkansas River (the term 'native waters', as herein used, being those waters covered and defined by

those waters covered and defined by Art. III-B of the Arkansas River Compact).

2. The interstate water relations of Colorado and Kansas with respect to the Arkansas River do not justify any objection to the proposed project development for the importation of Colorado River water (described in sub-paragraph (a) above).

3. The re-regulation of native waters of the Arkansas River (native waters being as above mentioned) concerns the Arkansas River Compact Administration and both Colorado and Kansas in complying with the provisions of the Arkansas River Compact and maintaining the benefits and obligations of the two states under that Compact. To that end, it is recommended to the Governors of Colorado and Kansas, and expressed as a policy of the Arkansas River Compact Administration, that the Initial Development, Gunnison-Arkansas Project, Roaring Fork Diversion, Colorado, as set forth in Project Planning Report No. 7-8a. 49-1 of the Bureau of Reclamation, be approved; provided, however, that there shall be no re-regulation of native waters of the Arkansas River as proposed in such report until a plan of operation, rules, regulations, procedures and agreements in furtherance thereof, including any pertinent agreements between the Corps of Engineers and the Bureau of Reclamation, shall have been submitted to, and approved by, the Arkansas River Compact Administration and the affected water users.

4. It is the purpose and intent of these recommendations that the proposed project development shall not interfere with or defeat the rights, interests and obligations of Colorado and Kansas under the Arkansas River Compact.

be transmitted to the Governors of the States of Colorado and Kansas and such Governors be and are hereby requested to submit the same to the Secretary of Interior with their official State comments and recommendations upon said proposed project and development.

On vote being taken, the motion carried and was declared adopted.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 400 Mission Square, 3750 University Avenue, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On September 15, 1989, I served the within REPORT OF SPECIAL MASTER RE WINTER STORAGE PROGRAM by placing copies of the document in separate envelopes for each addressee named below and addressed to each such addressee as follows:

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On September 15, 1989, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on September 15, 1989, at Riverside. California.

/s/ Sandra L. Simmons
Sandra L. Simmons

No. 105, ORIGINAL

In The

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

ARTHUR L. LITTLEWORTH, Special Master

REPORT – PART III

DECISION OF SPECIAL MASTER ON COLORADO'S MOTION TO DISMISS KANSAS' TRINIDAD RESERVOIR CLAIM

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant, UNITED STATES OF AMERICA, Defendant-Intervenor.	)	No. 105 Original October Term, 1985

ARTHUR L. LITTLEWORTH, SPECIAL MASTER

DECISION OF SPECIAL MASTER ON COLORADO'S MOTION TO DISMISS KANSAS' TRINIDAD RESERVOIR CLAIM

(Filed June 9, 1992)

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant, UNITED STATES OF AMERICA, Defendant-Intervenor.	)	No. 105 Original October Term, 1985

DECISION OF SPECIAL MASTER ON COLORADO'S MOTION TO DISMISS KANSAS' TRINIDAD RESERVOIR CLAIM

I.

INTRODUCTION

At the conclusion of Kansas' presentation of evidence on the operation of Trinidad Reservoir, counsel for Colorado announced that it would file a motion to dismiss that portion of the Kansas claim.[1] By stipulation, the motion was filed and briefed during the recess occasioned by the illness and ultimate withdrawal of Kansas' chief technical expert.

The Colorado motion rests upon the ground that Kansas failed to demonstrate upon the facts and the law that the operation of the Trinidad Project resulted in a

[1] Although Kansas had not rested its entire case, counsel indicated that Kansas had completed its evidence on the Trinidad Project. RT Vol. 78 at 138, 144-45 (May 16, 1991); RT Vol. 81 at 28-29 (May 21, 1991).

violation of the Arkansas River Compact. Colorado argues that Article IV-D of the Arkansas River Compact specifically allows future development in Colorado, by Federal or State agencies, including dams and reservoirs, provided that such development does not cause a material depletion in the usable flows of the Arkansas River to users in Kansas, and that Kansas failed to establish the required depletion.

The Kansas legal theory is based upon an alleged violation of Operating Principles that were approved by the Arkansas River Compact Administration for the operation of the Trinidad Project. Although Colorado does not concede that such a violation occurred, Kansas produced substantial evidence to that effect, and a violation of the Operating Principles has been assumed for purposes of this decision. It is the Kansas position that any failure to abide by the Operating Principles constitutes a Compact violation; that during the initial period of operation of Trinidad Reservoir (from 1979 to 1984) the tributary inflows from the Purgatoire River into John Martin Reservoir on the Arkansas River were substantially less in certain months than they would have been if the Operating Principles had been strictly observed; and that Kansas was entitled to 40 percent of the water thus lost to the Arkansas River.

Kansas Attorney General Robert T. Stephan, who personally made the opening statement for Kansas, said that these depletions totaled at least 20,000 acre-feet ("AF") over the 1979-84 period. RT Vol. 1 at 96 (September 17, 1990). Expert testimony for Kansas put the amount between 24,500 and 27,500 AF. RT Vol. 18 at 57 (Oct. 23, 1990); Kan. Exh. 580.

Although Trinidad Reservoir is a Federal project, the United States filed a statement that it did not intend to provide testimony or analysis during the trial on whether departure from the Operating Principles resulted in "injury" to Kansas, and accordingly, it would be "inappropriate" for the United States to take a position on whether Kansas had presented sufficient evidence to prove a Compact violation.

At the resumption of the trial on February 24, 1992, I presented my preliminary analysis and view of the motion, and requested later oral argument focusing on that analysis. Much of the day on March 10, 1992 was devoted to this argument. The parties at that time also requested an opportunity to file additional written argument and authorities. The last of these documents was filed on April 2, 1992.

The fundamental issue on which the Colorado motion turns is whether Kansas is required to show a material depletion in stateline flows caused by the operation of Trinidad Reservoir, or is required to prove only that the Operating Principles for the Project were violated, and that such violation caused less water to flow into John Martin Reservoir than would have occurred under strict compliance with the Operating Principles. Kansas did not attempt to establish that the flows of the Arkansas River at the state line were less than they would have been if the Trinidad Project had not been constructed or operated at all.

In the supplemental statements filed after oral argument, the United States raised new questions. The United States acknowledges that if a violation of the Operating

Principles is not enough to prove a Compact violation, then the Kansas claim is ripe for dismissal based upon its trial decision not to ". . . present evidence on the stateline impacts caused by the improper operations." U.S. Post-Argument Remarks at 2. But the United States goes on to ask whether a separate cause of action is available under the Compact to enforce compliance with its investigatory and administrative provisions in regard to the Trinidad Project, and if so, what allegations and proof are required. Those issues are also addressed in this decision.

II.

BACKGROUND INFORMATION

A. The Purgatoire River.

The Purgatoire River is a major tributary of the Arkansas. It flows in a northeasterly direction joining the main stem of the Arkansas at Las Animas just upstream of John Martin Reservoir. The Purgatoire originates on the eastern slopes of the Sangre de Cristo Mountains, which rise to elevations of 13,000 feet near the river's source. From this mountainous area, the river flows easterly, dropping rapidly for about 40 miles through rough and rocky terrain, and then emerging in the high plains area near the City of Trinidad. Here the elevation is about 6,000 feet. The river then flows through a wide shallow valley for about 35 miles before entering a narrow, rugged canyon for another 100 miles. This canyon gradually widens and merges with the extensive flat lands of the Arkansas Valley surrounding the City of Las Animas. Jt. Exh. 24a at 6.

Precipitation at Trinidad is on the order of 17 inches annually, and higher in the mountainous portion of the drainage basin. About 61 percent of the total precipitation at Trinidad occurs during the spring and summer months of April through August. The Purgatoire River above Trinidad is perennial, with the greatest volume of run-off being produced by melting snow during April, May and June. Thunderstorms produce floods with high peaks and these usually occur after the snow-melt season. Jt. Exh. 34 at 13-14. Flows at the Trinidad gauging station averaged 62,100 AF annually for the period 1925-1957. This study period has been considered indicative of future hydrologic conditions. Annual flows at this station ranged from 16,300 AF in 1951 to 197,300 AF in 1942. Jt. Exh. 24a at 13.

Historically, there were eleven ditch systems supplying irrigation water in the Trinidad area, with water rights priority dates ranging from 1861 to 1920. *Id.* at 11. Diversions averaged 53,200 AF per year. *Id.* at 14. A Bureau of Reclamation study found, however, that only about 37,300 AF of these diversions were actually needed to meet crop requirements. Because supplies in the area were undependable, a large part of the historic diversions were made when the water was available rather than when actually needed to meet crop growth requirements. *Id.* at 16. The Board of Engineers for Rivers and Harbors characterized the streamflow as "erratic and unseasonable for timely irrigation use"; moreover, it found that the existing storage and regulatory facilities were "inadequate for complete regulation of the available water supply for maximum crop utilization." Jt. Exh. 34 at 3.

B. History of the Trinidad Project.

The Bureau of Reclamation initiated preliminary studies to improve irrigation in the Trinidad area as early as 1937. In this same general time-frame, the Corps of Engineers was also considering the "serious and long-standing flood problem" at Trinidad. Jt. Exh. 34 at 42. The Corps at first planned to provide necessary flood protection through the construction of levies and channel improvements without any dam. However, cooperative studies conducted by the Corps and the Bureau during 1952 and 1953 led to recommendations for a reservoir project designed to meet both flood control and irrigation needs. The results of these studies were presented in a Review Report by the Corps of Engineers, June 30, 1953, printed in 1956 in House Document No. 325, 84th Congress, Second Session. Jt. Exh. 34.

House Document No. 325 includes many of the important reports and letters associated with the legislative history of the Trinidad Project. These include not only the basic 1953 Review Report of the District Engineer, but also the report and recommendations of the Chief of Engineers, the Report of the Board of Engineers for Rivers and Harbors, comments of various Federal agencies, correspondence reflecting the views of both Kansas and Colorado, and actions by the Arkansas River Compact Administration with respect to the project. *Id.*

As recommended by the District Engineer, and approved by the Chief of Engineers, the Trinidad Project called for the construction of a dam and reservoir on the Purgatoire River about four miles upstream from the City of Trinidad. *Id.* at 1, 44-46. Capacity of the proposed

reservoir was to be 140,700 AF, allocated as follows: 46,700 AF for flood control, 55,000 AF for irrigation, and 39,000 AF for sediment control. *Id.* at 28.

To obtain "maximum beneficial use of the irrigation storage," the Bureau of Reclamation suggested during this early planning phase that the project be operated according to five basic conditions:

> "(a) Transfer of the storage decree of the Model Land & Irrigation Co., for 20,000 acre-feet annually, from the present site to the proposed Trinidad Reservoir.[2]
>
> "(b) Storage in Trinidad Reservoir of flood flows originating on Purgatoire River above the dam site which would otherwise spill from John Martin Reservoir.
>
> "(c) Storage in Trinidad Reservoir of the winter flows of Purgatoire River historically diverted for winter irrigation of project lands.
>
> "(d) Regulation in Trinidad Reservoir of summer flows historically diverted to project lands provided that future streamflow records disclose such further regulation would not materially decrease depletions or that any material increase in depletions be compensated by suitable replacement to lands served by John Martin Reservoir.

---

[2] Historically, the Model Reservoir of the Model Land & Irrigation Co. provided the only significant storage capacity in the area. The storage decree for the Model Reservoir was 20,000 AF, but a survey in 1946 indicated that the usable capacity of the Reservoir had been reduced to 6,200 AF because of sediment deposition and deterioration of the dam. Jt. Exh. 24b, Appendix A at 2.

> "(e) Storage in Trinidad Reservoir of all flood flows originating on Purgatoire River above the reservoir other than those specified in condition (b), provided that suitable replacement is made to John Martin Reservoir to the extent that such storage in Trinidad Reservoir would result in material depletion of the inflow from Purgatoire River into John Martin Reservoir and interfere with its operation as established by the Arkansas River compact." Jt. Exh. 34 at 4.

The District Engineer found that under the Arkansas River Compact the irrigation capacity in the reservoir could be operated in accordance with the first three of these conditions, and that such operation would not "significantly deplete the water supply presently available to water users downstream from the project area." *Id.* However, he stated that the impact of conditions (d) and (e) was "indeterminate," and recommended that the project not be operated pursuant to those conditions until their feasibility "has been demonstrated." *Id.* at 45. Moreover, he noted that operation under conditions (d) and (e) might require suitable arrangements to be made with those served from John Martin Reservoir under the terms of the Arkansas River Compact. *Id.* at 29. The Chief of Engineers and the Board of Engineers for Rivers and Harbors concurred with these recommendations, and I conclude that Congress' authorization embraced only these first three conditions. *Id.* at 1, 4-6; Jt. Exh. 35 at 309.

The District Engineer specifically recognized the Arkansas River Compact in his 1953 report, quoting from appropriate provisions, including Article IV-D, which permits upstream development in Colorado provided

". . . that the waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability for use. . . ." Jt. Exh. 34 at 21. The District Engineer concluded that operation of the project under these three basic conditions outlined by the Bureau of Reclamation, and accepted by the Corps, ". . . would not result in material depletion of the Purgatoire River inflow to John Martin Reservoir." *Id.* at 30, 43. Reference is made in the Report to specific studies which indicated that the proposed Trinidad Reservoir would deplete the usable inflow to John Martin Reservoir by an average of about 390 AF annually. *Id.* at 41.

In 1954 the Engineering Committee of the Arkansas River Compact Administration reviewed the project and determined that the depletion to John Martin would average 530 AF per year, exclusive of the years in which there would have been spills from the reservoir. Jt. Exh. 19, Oct. 26, 1954 Minutes at 15-16. Hans Kramer, Chairman of the Compact Administration, who had also chaired the Compact negotiations, said the question was whether an average annual depletion of 530 AF constituted a "material" depletion within the meaning of Article IV-D of the Compact. *Id.* at 14. In December, 1954 the Compact Administration voted not to approve the Trinidad Project "at this time." Jt. Exh. 19, Dec. 14, 1954 Minutes at 14. Chairman Kramer notified the Chief of Engineers of this action, stating that the main argument voiced against the project was concern about possible depletion of the supply to John Martin Reservoir. Jt. Exh. 34 at XVII. In General Kramer's own view, as an "engineer," such depletions would be "negligible." Jt. Exh. 19, Oct. 26, 1954 Minutes at 19.

The State of Kansas also initially opposed the project. In a letter to the Chief of Engineers, dated August 5, 1954, Governor Edward F. Arn stated:

> "Even the most conservative estimates indicate an increased depletion of Purgatoire River water. It is our conclusion that the operation of this project would, at times, materially deplete the water supply which would otherwise be available to Kansas water users through the John Martin Reservoir.
>
> "Under these conditions the State of Kansas at this time is opposed to the project as proposed." Jt. Exh. 34 at XV.

The following year, however, the State of Kansas and the Compact Administration b[illegible] conditionally reversed their positions. Kansas Governor Fred Hall wrote to the Chief of Engineers as follows:

> "This matter subsequently has been given further consideration by both the State of Kansas and the Arkansas River Compact Administration. It is recognized that there is a serious flood-control problem at Trinidad and an urgent need for measures to deal with it. The problems remaining to be resolved with respect to the proposed reservoir project pertain to the effect that its operation would have on water supplies which otherwise would be available for storage in the John Martin Reservoir and for use in Colorado and Kansas under the terms of their compact.
>
> "At their meeting on July 12, 1955, the Arkansas River Compact Administration adopted the following motion:

> 'That the Arkansas River Compact Administration approves the flood-control project on the Purgatoire River subject to an operating procedure to be approved by the affected water users in Colorado and Kansas, the State of Kansas and the administration.'
>
> "I concur in the action taken by the administration and hereby modify the position of the State of Kansas with respect to the proposed Purgatoire River project to conform to the views of the Arkansas River Compact Administration, as expressed in the motion quoted above." Jt. Exh. 34 at XVI.

The Trinidad Project was authorized by the 85th Congress under Public Law 85-500, enacted on July 3, 1958. The authorizing language is part of an omnibus act and consists of only a single sentence in the lengthy act that provides for the construction and preservation of a large number of public works throughout the country. The brief provision on the Trinidad Project reads:

> "The project for the Trinidad Dam on Purgatoire River, Colorado, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 325, Eighty-fourth Congress, at an estimated cost of $16,628,000." Jt. Exh. 35 at 309.

It is significant that the Congressional authorization did not make the project subject to an "operating procedure" to be approved by the State of Kansas and the Compact Administration, as conditioned in the Compact Administration's approval action. Congressional approval was based only upon the Chief of Engineer's

report. The "Operating Principles" on which the present Kansas claim rests were not adopted until 1967.

C. The 1961-1964 Operation Studies.

After the Trinidad Project was authorized in 1958, Congress appropriated funds for further planning studies to be conducted by the Bureau of Reclamation, but limited to the irrigation function of the project. Jt. Exh. 24a at 1-2. The studies were to "firm up" the findings of the 1953 Review Report of the District Engineer. Jt. Exh. 24b, Appendix A at 1. These studies were based upon the following reservoir space allocations: 51,000 AF for flood control, 20,000 AF for irrigation, 39,000 AF for joint use (i.e., for irrigation and sediment accumulations), and 4,500 AF for fish and recreation. Jt. Exh. 24a at 2. The total capacity of the reservoir was thus reduced from the 140,700 AF submitted to Congress to 114,500 AF. Allocations for the various functions were also modified. Flood control capacity was slightly increased, fish and recreation capacity was added, while the allocation for storage of irrigation water was substantially cut.

The initial Bureau studies, completed in 1961, assumed an equal sharing of the project water supply among the various irrigation ditches. Jt. Exh. 24b, Supplement to Appendix A at 1. This concept proved unacceptable to the local Purgatoire River Water Conservancy District. The District maintained that the study should be modified to take into account senior water rights, including the Model Land and Irrigation Company, which was providing the storage right. *Id.* This was done, and revised operations studies were completed in 1964,

including the development of detailed Operating Principles and Criteria. Jt. Exh. 24a.

The Bureau's 1961-64 studies recognized the prohibition in the Arkansas River Compact against a material stateline depletion but, subject to that limitation, stated that the conservation capacity of the reservoir would be used to regulate the flows of the Purgatoire River ". . . for maximum beneficial use of crops grown within the project area." Jt. Exh. 24b, Appendix A at 5. The water supply analysis in these studies was based upon a 33-year period, 1925-57, which was judged to be indicative of future conditions. Jt. Exh. 24a at 13. The project area consisted of 19,717 acres of irrigable land to be served by the eleven existing ditch systems. *Id.* at 2. The acreage limit of 19,717 acres called for the retirement of 5,975 acres of poor quality Class 6W lands, and the transfer of their water rights to 6,543 acres of idle, but more productive, irrigable lands. *Id.* at 2-4. Project diversions were to be limited to actual requirements (the so-called "ideal crop requirements") for the 19,717 acres of irrigable lands. *Id.* at 17; Jt. Exh. 24b, Appendix A at 7; RT Vol. 19 at 12-14 (Oct. 24, 1990). Operation of the project was expected to provide an additional effective crop irrigation supply averaging 6,760 AF annually. This improvement was expected to increase the average effective headgate irrigation supply from 61% of ideal requirements to 81.9%, and the crop supply from 74% of consumptive use requirements to 89%. Jt. Exh. 24b, Appendix A at 8; Supplement to Appendix A at 7.

As proposed in the original 1953 Review Report of the District Engineer, the 1961-64 studies assumed that

the 20,000 acre-foot storage decree for the Model reservoir would be transferred to Trinidad Reservoir, even though the existing capacity of the Model reservoir was on the order of only 6,200 AF. Jt. Exh. 24a at 2, 8; Jt. Exh. 24b, Appendix A at 2. Winter flows historically diverted for winter irrigation would also be stored. Jt. Exh. 24a, Appendix A at 2. Storage of winter water, however, was to be under the Model storage decree, and charged against that right. Jt. Exh. 24b, Appendix A at 6; Jt. Exh. 23 at 2, 11.

Based upon these operating conditions, it was assumed in both the 1961 and the revised 1964 studies that the Trinidad Project could be accomplished ". . . under the provisions of Colorado law and the Arkansas River Compact without adverse effect on downstream water users and the inflow to John Martin Reservoir." Jt. Exh. 24b, Appendix A at 7, 71. The 1964 study actually predicted a slight average increase of 400 AF annually in the inflow to John Martin as a result of the project. Jt. Exh. 24a at 22 (Table 8). This increase in downstream flow was expected to occur from more stable return flows, a decrease in channel losses during flood periods, and a small reduction in John Martin spills. *Id.* at 21.

III.

THE OPERATING PRINCIPLES

A. Approval of the Operating Principles.

As part of the 1964 studies, proposed Operating Principles were developed and included as Appendix A to

that report.[3] Jt. Exh. 24a. The Operating Principles were submitted for review and tentatively approved by the Corps of Engineers, the Colorado Water Conservation Board, and the Purgatoire River Water Conservancy District. *Id.* at 23. In addition, the proposed Operating Principles were reviewed by the Kansas members of the Compact Administration and the Kansas Water Resources Board. *Id.*; Jt. Exh. 42.

On December 30, 1966, Governor William H. Avery of Kansas wrote to H. P. Dugan, Director of Region 7 of the Bureau of Reclamation, stating that the report on the Trinidad Project had been considered by various Kansas agencies and users, and acknowledging that the Bureau of Reclamation had also provided additional information on the effects of the proposed project on downstream water supplies. On the basis of this information, he stated:

> ". . . [T]he Water Resources Board advises that in its judgment, the proposed Trinidad Project will not materially add to the depletion of the water supply of the Purgatoire River and to John Martin Reservoir providing that the project is operated in strict conformity with the guidelines used in the investigation and with the operating principles amended to incorporate the following conditions. . . ." Jt. Exh. 42.

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[3] The report also included certain "Operating Criteria" for the Purgatoire River Water Conservancy District. These criteria included more detailed provisions for the operation of the Trinidad Project, but were not submitted to the Compact Administration for approval. They are, nonetheless, incorporated into the repayment contract between the Purgatoire District and the Bureau of Reclamation. Jt. Exh. 39, Exhibit B.

Governor Avery then set forth five Kansas conditions, of which numbers 2, 3 and 4 may be relevant to the present issues:

> "1. All inflows over established Colorado water rights (1156.05 cfs) be designated flood flows and released as promptly as downstream conditions permit. The only time water so designated may be stored in the conservation pool will be when John Martin Reservoir does not have the capacity to store additional water.
>
> "2. Any subsequent amendment of the operating principles should be subject to review and approval of the same interests as provided for in the original procedure.
>
> "3. Assurances that there will be no significant increase in water use which would result in a depletion of water yield to other Colorado and Kansas water users.
>
> "4. That 5 years after beginning operation of the Trinidad Reservoir for irrigation purposes, the operating principles be reviewed to determine the effect, if any, the operation has had on other Colorado and Kansas water users and the principles amended as necessary. Each 10 years thereafter reviews should be provided with amendments as needed.
>
> "5. All operating records be open for inspection by any qualified representative of the Arkansas River Compact Administration." Jt. Exh. 42.

If the five Kansas conditions were accepted by the Bureau of Reclamation and the Purgatoire River Water Conservancy District, Governor Avery wrote that Kansas

would be in a position to approve the amended Operating Principles and to support completion of the project. *Id.*

On January 26, 1967, the Purgatoire District adopted a resolution approving the five conditions proposed by Kansas, having found that they were "consistent with the manner of operation of said project as contemplated by this Board." Jt. Exh. 43. By letter dated February 1, 1967, the Regional Director of the Bureau of Reclamation advised Governor Docking of Kansas that the Bureau concurred in the resolution adopted by the Purgatoire River Water Conservancy District, ". . . and will be governed accordingly in implementing the 'Operating Principles.' " Jt. Exh. 44. In a separate letter to John M. Dewey, Kansas Water Resources Board, the Bureau confirmed its "commitment" to Kansas that the Trinidad Project would be operated "strictly in accordance with the 'Operating Principles' " as amended by the five Kansas conditions. Jt. Exh. 23, Appendix IV.

On March 20, 1967, at the suggestion of the Kansas Water Resources Board, the Bureau's Regional Director sent Governor Docking a letter setting forth the Operating Principles and the five Kansas conditions in one document. Jt. Exh. 46. Governor Docking responded to the Bureau, signifying his approval of the amended Operating Principles, and stating that Kansas would offer no objection to completion of the Trinidad Project ". . . subject to the acceptance of the amended principles by the Arkansas River Compact Administration." Jt. Exh. 45.

The Operating Principles had been included as part of the repayment contract between the United States and

the Purgatoire River Water Conservancy District for the reimbursable costs of the Trinidad Project. Jt. Exh. 39. The contract provides, in part, that the regulation, storage and release of the waters of the Purgatoire River will be subject to the Operating Principles. *Id.* at 4, 14.

Against this background, the Trinidad Project and the Operating Principles came before the Compact Administration at its meeting on June 6, 1967. In attendance were representatives of the Corps of Engineers, Bureau of Reclamation, United States Geological Survey, Purgatoire River Water Conservancy District, and several of the downstream Arkansas Valley ditch companies. The discussion, as reflected in the minutes, was relatively brief and centered on the relationship between the five Kansas conditions and the original draft of the Operating Principles.

In particular, the question was whether the five-year review required under the Kansas conditions would prevail over the ten-year review provided in Part F of the original Operating Principles. Mr. Ogilvie, the representative of the Bureau of Reclamation, said that it would. Jt. Exh. 19, June 6, 1967 Minutes at 6. More generally, a Colorado member of the Compact Administration assured the meeting that any amendments such as the Kansas conditions would supersede the original document. *Id.* The Colorado member then moved that the Operating Principles be approved ". . . with the understanding that the amendments take precedent [sic] over the original operating principles as presented." *Id.* The Kansas members thought that it would be "less clumsy" to redraw the principles and incorporate the amendments into a single document. After a recess, the Colorado

member withdrew his original motion with the following substitute action:

> "Moved that the document of March 20, 1967 submitted to Governor Docking and signed by H. P. Dugan and counter-signed by Dr. Donnelly be approved by the Arkansas River Compact Administration. Mr. Green seconded the motion and after some discussion the motion was carried by vote of the states. The documents are attached as Appendix A." *Id.* at 7.

This letter from Bureau of Reclamation Director Dugan, which was the subject of the Compact Administration action, expressly recognized the desirability of including the Operating Principles and the five Kansas conditions "clearly in one document so as to avoid any misunderstanding," and he did so in that letter by adding the five Kansas conditions to the end of the Operating Principles. Jt. Exh. 46.

In the briefs of counsel, there is considerable argument over the nature of the action taken by the Compact Administration, that is, whether such action constitutes a binding Compact rule or regulation, procedure, or action to implement the Compact, or whether it is only a finding that becomes prima facie evidence, or whether it is none of these. The minutes themselves do not specifically characterize the nature of action in any way that assists in this inquiry.

B. Operation of the Trinidad Project, 1979-84.

Construction of Trinidad Reservoir was completed and it was ready to impound water on January 1, 1977. Jt.

Exh. 23 at 4. However, litigation within Colorado delayed any substantial storage until March, 1979. Since May of 1979, most of the project irrigation canals have been delivering water regulated by Trinidad Reservoir. *Id.*

During the 1979-84 period, Colorado's Division 2 Engineer permitted the Purgatoire River Water Conservancy District to make an accounting transfer of any water stored under the Model right that remained in storage at the end of the water year into the "joint-use pool." Jt. Exh. 23 at 9-11. This was the 39,000 AF of capacity assigned to "irrigation and sediment accumulation," and was in addition to the 20,000 AF allocated solely to "irrigation." *Id.*, Appendix I at 2. This practice is known as "rollover," and permitted storage, during the subsequent year, of any part of the full 20,000 AF Model right that was not stored in the previous year. The Division 2 Engineer also permitted the Purgatoire District to store winter inflow to Trinidad Reservoir during the non-irrigation season under the direct flow priorities of the project ditches, and did not account for such storage against the Model storage decree. Jt. Exh. 23 at 11. The Kansas complaint does not specifically refer to such storage of winter water, but evidence on the alleged violation was introduced by Kansas without objection from Colorado or the United States. I therefore treat the winter water storage issue as a part of the present motion.

In its 1988 report, the Bureau of Reclamation stated that these two practices (rollover and winter water storage) were contrary to the assumptions underlying the 1961-64 studies. The Bureau stated:

> "These operation studies [the 1961-64 studies] were based on the assumption that any water remaining under the Model right would be included in the following year's entitlement to storage and that the winter storage would be stored under the Model right. The studies concluded that the Project would not, on an average annual basis, cause additional depletion to the inflow to John Martin Reservoir." Jt. Exh. 23 at 11; RT Vol. 18 at 68 (Oct. 23, 1990).

From a review of House Document No. 325, and the 1961-64 studies, the Bureau said there is "little doubt" that the Bureau personnel formulating the irrigation components of the project "did not intend that water stored under the Model right be transferred out of the Model Right or that winter water be stored under any right but the Model right." Jt. Exh. 23 at 11.

The Bureau of Reclamation concluded in its 1988 report that the practices of rollover and winter water storage outside of the Model decree constituted a "departure from the intent of the operating principles." *Id.*

Kansas complained immediately about the way Trinidad Reservoir was being operated. A special meeting of the Compact Administration was called by Kansas officials on June 30, 1980. Kansas representatives stated that the joint use capacity account had been illegally used; that such capacity was to be used only for sedimentation, the purchase of additional downstream rights, and the capture of available water in priority if John Martin Reservoir were spilling. Jt. Exh. 19, June 30, 1980 Minutes at 3.

Carl Bentrup, one of the Kansas representatives to the Compact Administration, who was the only member who had participated in the Administration's 1967 decision, explained that the intent of the Operating Principles, as approved by the Administration in 1967, was that no more than 20,000 AF of water would ever be stored behind Trinidad Dam, unless John Martin were overflowing or additional downstream water rights were purchased. *Id.* The Compact Administration found that in October, 1979 the Purgatoire River Water Conservancy District had transferred 18,290 AF stored under the Model reservoir right into the joint use pool, and in the following year, when the Model storage right came into priority, 20,000 AF of additional water were stored. *Id.* at 7-8; RT Vol. 17 at 100-101 (Oct. 22, 1990).

On the basis of the Kansas charges, the Compact Administration authorized an investigation of the Trinidad Project, but the issues could not be resolved at the Compact Administration level.[4] Jt. Exh. 19, June 30, 1980 minutes at 7-8. Finally, in December, 1984, the Compact Administration asked the Bureau of Reclamation to conduct a review of Trinidad Reservoir operations with the participation of both States and other interested parties. Jt. Exh. 19, Dec. 11, 1984 Minutes at 10; RT Vol. 17 at 105 (Oct. 22, 1990). This request also coincided with Kansas' Condition 4, which called for a five-year review. The

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[4] See Decision of Special Master on Colorado Motion to Stay, October 21, 1988, for some of the Administration history during this period of time. Kansas continued after 1980 to register complaints about the Trinidad operations. Jt. Exh. 23 at 4.

results of the Bureau's study are found in a report entitled "Review of Operating Principles," dated December 1988 and admitted into evidence as Joint Exhibit 23.

C. Bureau of Reclamation Review of Trinidad Project Operations, 1979-84.

In performing its review of 1979-84 project operations, the Bureau of Reclamation first developed a computer model to reconstruct its 1961 report. Jt. Exh. 23 at 12. The model and input data were then modified to fit the parameters of the 1964 study. *Id.* The computer-based reconstruction of the 1964 study became the Bureau's "baseline" study, denominated "1H." *Id.* It simulates operation of the Trinidad Project over the 1925-57 period, in strict conformity with the Operating Principles. *Id.* at 17; RT Vol. 18 at 24 (Oct. 23, 1990). Study "5H" also simulates operation of the Trinidad Project over the 1925-57 period, but alters the baseline criteria to assume the practice of rollover and the storage of winter water without charging such storage against the Model right. Jt. Exh. 23 at 17-18; RT Vol. 18 at 24, 27 (Oct. 23, 1990).

The Bureau compared both of these simulations against a "without project" condition, that is, the storage of only 6,000 AF under the historic Model storage decree. Jt. Exh. 23 at 17. The results of these comparisons are set forth in Table 5 of Jt. Exh. 23 at 21-22. Assuming that the Trinidad Project was in operation during the 1925-57 period under conditions of the 1964 study (i.e., no rollover and no winter water storage outside of the Model right), Study 1H shows that the inflow to John Martin would have increased by an average of 1,000 AF per year.

Jt. Exh. 23 at 21, Table 5. Assuming the practice of roll-over and the storage of winter water, the estimated inflow to John Martin Reservoir becomes less, but it still shows an average increase of 300 AF annually. *Id.* It is interesting to note that this 1988 computerized simulation demonstrates the same slight increase of inflow into John Martin as the 1961 study, although the 1988 results assumed a violation of the Operating Principles, whereas the 1961 study assumed strict compliance. *Id.*, Table 5, 1961 column.

The 1988 Bureau Report includes numerous other comparison "runs," as they are sometimes called. Each of these additional computer simulations varies certain of the assumptions used. For example, both the baseline 1H study and run 5H assumed that the storage capacity of the joint use pool was 19,500 AF. This figure represents the average capacity available over the life of the project, assuming some gradual filling through sedimentation, and it is the same capacity that was utilized in the Bureau's 1961-64 studies. RT Vol. 18 at 31-32 (Oct. 23, 1990); Jt. Exh. 23 at 7. However, while run 5H39 uses operational criteria similar to run 5H, it assumes that the capacity of the joint use pool is 39,000 AF, rather than 19,500. Under run 5H39, therefore, the full capacity of the joint use pool is deemed to continue to be available, without reduction due to sedimentation. While this assumption seems unrealistic, use of the larger storage capacity nevertheless causes an average reduction of inflow to John Martin Reservoir of only 100 AF annually. Jt. Exh. 23 at 21, Table 5.

The full array of the different comparison studies and assumptions is described on pages 17-20 of Joint Exhibit

23, with the results shown on Tables 5, 6, 8 and 9. The Bureau concluded that "under most of the practices and conditions studied," the inflow to John Martin Reservoir would be larger than that which would have occurred without the project. Jt. Exh. 23 at 28-29. These various studies of the 1925-57 period, according to the Bureau, ". . . provide a sound basis for assessing future impacts and evaluating proposed amendments." *Id.* at 28. The Bureau's overall conclusion on the future impact of the practice of rollover and storage of winter flows is stated as follows:

> "The transfer of water from the Model Right and the storage of winter water under the direct flow decrees, either singularly or collectively, *will not cause the future usable inflow to John Martin Reservoir to be less with Trinidad Project in operation than it would have been without the Project*. These practices will, however, result in less inflow to John Martin Reservoir than would occur if the water rights were administered in accordance with the intent of the Operating Principles." Jt. Exh. 23 at 55. (Emphasis added.)

Turning to the Kansas assessment of these various studies, Brent E. Spronk, Kansas' expert witness on this subject, testified that the Bureau's Study 5H39NOWBP best contrasts the actual operation of the Trinidad Project (i.e., including rollover and winter storage) with historical conditions. RT Vol. 20 at 66, 68-69 (Oct. 25, 1990); Jt. Exh. 23 at 20. Spronk acknowledged that whether this run would best indicate future impacts would depend upon how fast the sediment portion of the reservoir fills and the outcome of a legal dispute affecting certain winter bypasses. RT Vol. 20 at 69-70 (Oct. 25, 1990). Even so, this

study shows that the average inflow to John Martin Reservoir would be reduced by virtue of the Trinidad Project by only 200 AF per year. Jt. Exh. 23 at 22, Table 5. Given the study assumptions as well as the results, I do not believe that it demonstrates a material depletion within the meaning of the Arkansas River Compact.

The Bureau's 1988 Report also includes three case studies for the years 1979 through 1984 during which the Trinidad Project was in actual operation. The Bureau found that during this period of time, the practice of rollover and the failure to charge winter storage against the Model decree resulted in net additional water storage in Trinidad Reservoir of 23,855 AF. Jt. Exh. 23 at 12. This is not to say, however, that the inflow to John Martin Reservoir was reduced by an equivalent amount. The three case studies were undertaken to determine that impact on John Martin. *Id.* For the initial 1979-84 period, they were an effort to compare what was expected to occur, under the 1961-64 studies, with what actually happened. RT Vol. 17 at 117-18 (Oct. 22, 1990).

In each of the three cases, the Bureau simulated project operations in strict compliance with the Operating Principles, that is, without transfer of storage under the Model Right into the joint use pool, and without storage of winter water outside of the Model Right. Jt. Exh. 23, Appendix II at 26. In both Case 1 and Case 2, the Bureau assumed irrigation of the full project area of 19,717 acres, and used the 1961 study criteria to determine the headgate diversions and return flows from such irrigation. Thus, diversions were not actually measured but rather were calculated upon the "ideal irrigation requirement"

for all of the project lands. RT Vol. 17 at 115 (Oct. 22, 1990).

The actual diversions during the 1979-84 period exceeded these "ideal" requirements, which called for increased irrigation efficiencies in order to minimize impacts on downstream users. Jt. Exh. 24a at 17; Jt. Exh. 24b, Appendix A at 7; Jt. Exh. 23 at 42-44; RT Vol. 18 at 36-37 (Oct. 23, 1990). While these studies assumed that the 19,717 acres of project lands were irrigated, this also was not true in fact. Because it was necessary to rehabilitate some of the distribution systems, a "substantial part" of the project lands was not irrigated during the early years. Jt. Exh. 23 at 4, 25, 28. At the same time, some of the Class 6W lands that were to have been retired did receive water, although the Bureau concluded this use had no impact on downstream users. *Id.* at 55. Under Case 3, the Bureau simply used the actual amount of irrigation diversions during the study period. *Id.*, Appendix II at 26.

The results of the three case studies are shown on Table 4 at page 16 of Joint Exhibit 23. Case 1 shows a net increase in the flows into John Martin of 3,500 AF over the study period of 1979-84 by virtue of the Trinidad operations. Case 2 shows a net decrease of 3,600 AF. Finally, Case 3 shows a net decrease of 11,600 AF.

The Bureau states that Case 3 ". . . best represents the actual impacts resulting from the departures from the intent of the Operating Principles." Jt. Exh. 23 at 25. Yet from the standpoint of "injury to downstream users," the Bureau concludes that Case 1 gives the "most reasonable results." *Id.* at 26. The most significant Bureau conclusion

is that none of these three case studies predicts future impacts:

> "The studies run on the operation during the 1979-84 review period *do not* provide a sound basis for assessing the future impacts that would be caused by transfer of water out of the Model Right and storage of winter water under the direct flow rights. These studies are also not useful for evaluating proposed amendments to the Operating Principles because the full project acreage was not irrigated during the review period, these studies are not representative of expected future conditions. Since the studies on the review period do not compare actual operation to a 'without project' condition, they cannot be used to determine what, if any, injury the Project may have on downstream water users." Jt. Exh. 23 at 28. (Emphasis in original.)

The Bureau states that sufficient information was not available to make a "without project" comparison for the 1979-84 period.

> "However, none of the three studies gives a true picture of injury because they do not compare the actual condition to a 'without project' condition. We investigated making the 'without project' comparison and concluded that there was not sufficient information available to make meaningful comparisons." *Id.* at 26.

The Bureau does acknowledge, however, that the practice of rollover and the storage of winter water outside of the Model right during the 1979-84 review period ". . . has depleted the *usable* inflow to John Martin Reservoir when compared to the inflow that would have occurred had the Trinidad Project been in accordance

with the intent of the Operating Principles." *Id.* at 55. (Emphasis in original.)

Finally, the Bureau recommended that the transfer of water from the Model storage right, and the storage of winter flows, be discontinued until such time as the Operating Principles are amended to recognize these practices. *Id.* at 57. Dr. Jeris Danielson, Colorado State Engineer, turned this recommendation into a directive. On April 27, 1989 he wrote to the Purgatoire River Water Conservancy District, stating in part:

> "I have been advised by legal counsel for the State of Colorado that the Bureau of Reclamation's new interpretation of the Operating Principles is likely to be viewed as persuasive with regard to these practices. Therefore, although the Operating Principles do not explicitly adopt the criteria used in the operation studies performed by the Bureau of Reclamation, I have been advised that until such time as the Operating Principles are amended or a court of competent jurisdiction determines that these practices are not a departure from the intent of the Operating Principles, I should administer the Project water rights consistent with the Bureau of Reclamation's most recent interpretation of the Operating Principles." Jt. Exh. 52.

He concluded by directing that, effective November 1, 1988, Trinidad Reservoir would be administered without rollover or storage of winter water outside of the Model right. *Id.*

It appears that this directive is currently being followed, although a state action has been filed to amend relevant water rights decrees.[5]

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[5] In the summer of 1990, shortly before commencement of this trial, Kansas filed a Petition for Writ of Prohibition asking the Supreme Court to restrain Case No. 88CW21 in the Colorado District Court, Water Division No. 2. That case had been brought by the Purgatoire River Water Conservancy District and involved the Operating Principles for the Trinidad Project. On September 17, 1990, an affidavit by M.E. MacDougall, the Purgatoire District's attorney, was filed in the prohibition proceeding in response to my request for information concerning the nature of the state court suit. In his affidavit Mr. MacDougall represents that the purpose of the suit is to obtain modification of the state court decree which authorized moving the location of the Model storage right to the Trinidad Project. That decree was entered on April 15, 1965 in Civil Action No. 19793 in the District Court for Las Animas County. (Certain later decrees are also pertinent. See *Purgatoire River Water Conservancy Dist. v. Kuiper*, 197 Colo. 200, 204-205, 211, 593 P.2d 333.) The 1965 decree had provided that storage at the new location would be conducted in accordance with House Document No. 325 "as implemented" by the Operating Principles. Mr. MacDougall concedes that the state court does not have jurisdiction to amend the Operating Principles; it appears that adjustment of the state court decrees is being sought in case the Operating Principles are amended.

On the first day of trial herein, Kansas withdrew its request for prohibition, and the Conservancy District since then has tried to have Case No. 88CW21 set for trial. However, other parties have objected on the basis of the pendency of this Supreme Court litigation. The latest information received on this subject is a May 8, 1992 letter from the Clerk of the Water Court stating that Case No. 88CW21 "is presently on a 'hold' status until a ruling is made in *Kansas v. Colorado*."

IV.

ANALYSIS AND DISPOSITION OF THE ISSUES

A. The Kansas Legal Theory.

The legal theory now being advanced by Kansas in support of its Trinidad claim is not apparent from the face of the complaint. The Kansas complaint centers around the allegation that Colorado and its water users ". . . have materially depleted the usable and available stateline flows of the Arkansas River" in violation of the Arkansas River Compact. Complaint, para. 7. Paragraphs 8 through 10 of the complaint specify certain actions which have caused or have allowed the material depletions to occur. The only direct mention of the Trinidad Project comes in Paragraph 12, where it is listed among several "alleged Compact violations" which the Compact Administration undertook to investigate in 1985, pursuant to Article VIII-H of the Compact. The specific reference is to "Colorado's artificially transferring water from the storage pool in Trinidad Reservoir to the sediment pool and then refilling the storage pool to the detriment of downstream users."

The brief filed by Kansas in the Supreme Court in support of its motion to have the court exercise its original jurisdiction carries a more general reference to the Trinidad Project, but still links the Trinidad issues to a material depletion in river flows. Kansas states there that the 1985 investigation by the Compact Administration was to determine whether ". . . the operation of the Trinidad dam and reservoir project," among other actions in Colorado, caused a material depletion in the waters of the Arkansas River. Kansas Brief at 4. No mention of the Operating Principles for the Trinidad Project appears in

the Complaint or any of the accompanying documents. Nor is there any suggestion that a claim or cause of action is being pursued based upon a violation of the Operating Principles only.

During the trial, however, Kansas presented quite a different legal concept in support of its Trinidad claim. The Kansas trial presentation rested upon a showing that the Operating Principles were violated, and the assertion that such violation *per se* constituted a Compact violation.[6] Kansas Supplemental Statement at 17. Kansas attempted to sever its Trinidad claim from any need to show injury or a material depletion in the usable flows of the Arkansas River available to Kansas. During oral argument, counsel for Kansas summarized the point:

> "Kansas believes that the Operating Principles are binding on both parties, that a departure from the Operating Principles is a violation of the Compact, regardless of injury. The test is not whether there has been a material depletion, but rather whether there has been a departure from the Operating Principles." RT Vol. 94 at 19, 38-39 (March 10, 1992).

It is the position of Kansas that the Operating Principles were properly adopted by the Compact Administration under authority of Article VIII-B of the Compact, and

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[6] This opinion does not address the possible question of whether Kansas has a claim for violation of the Operating Principles that is independent of the Compact, that is, a cause of action based upon a separate agreement with Colorado, or as a third party beneficiary under the repayment contract, or otherwise.

accordingly are binding upon the State of Colorado. Kansas Brief in Opposition to Colorado's Motion at 4-5, 10, 28; RT Vol. 94 at 26-27 (March 10, 1992). Any departure from the Operating Principles, according to Kansas, ". . . is therefore a violation of the Compact." Kansas Brief in Opposition to Colorado's Motion at 28. Depletions from such "Compact" violations were quantified by comparing the flows into John Martin Reservoir "as they would have occurred under the Operating Principles with the flows that occurred under actual operations." *Id.*

Under the evidence in this case, such a measure of damages would afford Kansas significant benefits from the project, as opposed to merely protecting Kansas and other downstream users against material depletions. Kansas asserts that a without-project analysis, that is, comparing the flows actually received with those that would have occurred in the absence of the project, is not appropriate or consistent with applicable law. *Id.* at 18.

B. The Kansas Testimony and Evidence.

Much of the Trinidad evidence was documentary, introduced by both States in the form of joint exhibits. These exhibits include the legislative history of the project in Congress, the Bureau's 1961-64 studies, development and approval of the Operating Principles and the five Kansas conditions, consideration of the project by Kansas and the Compact Administration, and the Bureau's review of the initial project operations from 1979 through 1984. Kansas also offered the testimony of Brent E. Spronk, one of its chief expert witnesses.

Spronk quantified the depletions of inflow into John Martin Reservoir, according to the Kansas legal theory. That is, using the Bureau's Case 1 and Case 3 Studies with certain adjustments, he calculated monthly depletions of the inflow to John Martin Reservoir, based upon the differences between actual inflows during 1979-84 and those that would have occurred under strict compliance with the Operating Principles. In making this analysis Spronk looked only at the months in which depletions occurred, and then totaled the amounts of such depletions. RT Vol. 17 at 133-36, 139-40 (Oct. 22, 1990); RT Vol. 18 at 62 (Oct. 23, 1990). He deliberately chose not to offset those depletions by the many months during which the Trinidad Project increased inflows into John Martin.

On this basis, Spronk concluded that during the 1979-84 period the total additional inflow into John Martin Reservoir, under strict compliance with the Operating Principles, would have been between 24,500 AF and 27,500 AF. RT Vol. 18 at 57 (Oct. 23, 1990); Kan. Exh. 580. In accordance with the allocation formula the parties now use (the 1980 Resolution), Kansas would have been entitled to 40% of this additional storage. RT Vol. 18 at 71, 117-18 (Oct. 23, 1990).

Spronk's testimony reflects the Kansas legal position that the Operating Principles have to be complied with each month, without considering averages. RT Vol. 17 at 139-40 (Oct. 22, 1990). According to this view, a violation of the Operating Principles is not to be offset by additional flows provided at some other time. The result, of course, is to allot to Kansas more water than it would

have received if the Trinidad Project had not been constructed.

On cross-examination, Spronk acknowledged that his analysis would not be appropriate if the Trinidad operations were looked at in terms of injury to Kansas, instead of merely considering the reductions caused by the practices of rollover and winter storage. RT Vol. 18 at 72 (Oct. 23, 1990). In that event, he agreed, the storage available in John Martin Reservoir would have to be taken into account. He testified:

> "In terms of injury, I think you would have to look at whether the shortages of water that were made to the inflow of John Martin caused at any time a reduction in the quantity of water available to Kansas water users at the time that they demanded or needed water. In that light, if the Kansas account at that time did not go to zero and replacement for some previous depletion had been made – in other words, there is an increase in a month – in terms of injury, the injury may in fact be mitigated by the accretions that occur after depletion occurred; or visa versa if there is accretion before the depletion, that would prevent injury so long as the magnitudes are the same and so long as the amounts of water that are available are there when Kansas would have otherwise needed it and called for it." *Id.*

Kansas presented no specific evidence that coupled the depletions and accretions from project operations to the water stored in John Martin Reservoir, or to any injury to Kansas. Nor did Spronk make a without-project analysis. That is, he did not compare the actual inflows into John Martin Reservoir for the 1979-84 period of

operations with flows that would have occurred if the Trinidad Project had not been built. *Id.* at 74. He testified that such study was not necessary ". . . to determine whether depletions had occurred as a result of the departure from the Operating Principles." *Id.* However, he added that it would be difficult to make an accurate without-project analysis for 1979-84 because of uncertainty in estimating diversions in the absence of the project. RT Vol. 19 at 11, 14 (Oct. 24, 1990). In the final analysis, however, Kansas offered no evidence, apart from the Bureau studies, to show that the actual operation of the Trinidad project caused it to receive less water than under historical, without-project conditions. As already noted, the Bureau had concluded that the practices of rollover and storage of winter water would not cause ". . . the future usable inflow to John Martin Reservoir to be less with the Trinidad Project in operation than it would have been without the Project." Jt. Exh. 23 at 55.

C. The Nature of the Compact Administration's Action in Approving the Operating Principles.

Kansas' Trinidad claim rests upon establishing three propositions: first, that the action of the Compact Administration in approving the Operating Principles was a proper exercise of authority under Article VIII-B of the Compact and is therefore binding upon Colorado; second, that the Operating Principles are enforceable apart from showing a material depletion in usable river flows available to Kansas; and third, that injury from a violation of the Operating Principles may be established by considering only months in which depletions resulted,

without taking into account offsetting accretions in other months. It is open to question whether Kansas held the same legal theories when the complaint was framed in 1985, but nonetheless, the Trinidad issues were tried on this basis.

The Compact Administration is specifically given power to adopt by-laws, rules and regulations consistent with the Compact; to prescribe procedures for the administration of the Compact; and to perform all functions required to implement the Compact. Article VIII-B(1)(2)(3). Kansas argues that the action of the Compact Administration taken on June 6, 1967 comes within this Article, emphasizing primarily that the Administration's approval of the Operating Principles effectively makes them valid rules and regulations with the same binding force as the Compact. Kansas Supplemental Statement at 11, 14-15.

The Administration by-laws require notice and publication before rules and regulations can be adopted. These requirements were not met here, but Kansas cites authorities to the effect that parties with actual notice (Colorado) cannot complain about lack of publication. See *United States v. Floyd*, 477 F.2d 217, 222 (10th Cir.) *cert. denied*, 414 U.S. 1044 (1973); *United States v. Aarons*, 310 F.2d 341 (2nd Cir. 1962); *Tearney v. National Transp. Safety Bd.*, 868 F.2d 1451 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989).

Recognizing that the action actually taken by the Administration was a somewhat awkward motion to approve the letter from the Bureau to the Kansas Governor in which the Operating Principles and the five Kansas

conditions were stated, Kansas also submits authorities stating that it is the substance of an action that must be judged, not the label or lack thereof. See *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942); *A.F. of L. v. National Labor Relations Bd.*, 308 U.S. 401, 408 (1940); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2nd Cir. 1972); *Dresser Industries, Inc. v. Commissioner of Internal Revenue*, 911 F.2d 1128, 1138 (5th Cir. 1990).

However, Kansas' problem is not the lack of forgiving judicial precedents which permit a court to overcome technical deficiencies. Rather, it is the plain fact that the Compact Administration did not do, nor intend to do, what Kansas now claims. The Operating Principles were developed by the Bureau of Reclamation as part of its 1964 study, and came to symbolize the conditions under which that study was made. Those Principles were widely accepted by all other interested parties well before being considered by the Compact Administration. In fact, they had already been included in the February 10, 1967 signed repayment contract between the Bureau of Reclamation and the local Purgatoire River Water Conservancy District. The Operating Principles clearly were not rules of the Compact Administration in any normal sense.

The Governor of Kansas also gave his approval before the Compact Administration took up the matter. Jt. Exh. 45, dated April 11, 1967. His approval was subject to the "acceptance" of the "amended principles" by the Compact Administration. *Id.* The amendment, of course, referred to the addition of the five Kansas conditions. The relationship of those conditions to the original Operating Principles was essentially the only aspect of the Trinidad

Project discussed by the Compact Administration at its June 6, 1967 meeting. Jt. Exh. 19, June 6, 1967 Minutes at 5-7. The acceptance of the amended Operating Principles at that meeting appears to have been the final local clearance needed, as a practical matter, to permit construction of the project.

I have carefully examined the record presented here of the Compact Administration's consideration of the Trinidad Project. I find nothing to indicate that the Compact representatives of either State thought they were exercising binding authority under Article VIII-B. And the consequences of such authority, as argued by Kansas, make it less rather than more appropriate that such action should be implied.

Perhaps the fundamental flaw in the Kansas position can be seen most readily if the facts of this case are turned around. Assume that the Operating Principles were strictly observed, but nonetheless the actual Trinidad operations still caused a material depletion in the usable flows to Kansas users. Under the Kansas legal theory, the State of Kansas would have no recourse so long as the Operating Principles had been adopted by the Compact Administration pursuant to Article VIII-B. The agreement on the Operating Principles would supersede the Compact. During oral argument, this colloquy occurred:

> "Mr. Draper [counsel for Kansas]: Applying that to our situation here, I think it makes clear that Kansas is bound also by the Operating Principles. If it is – that is, when I say 'it,' I mean if the project operated consistent with those – I

think this case tells us directly that Kansas has no complaint under the Compact.

"Special Master: Even if there were a material depletion at the state line?

* * * *

"Special Master: . . . If you tell me that you think Kansas is bound in the sense that if the Operating Principles were followed and a material depletion at the state line were to result that it would have no cause of action, haven't you in essence amended the Compact?

"Mr. Draper: No. The Compact Administration has implemented the Compact, your Honor." RT Vol. 94 at 43-44 (March 10, 1992).

Colorado disagrees with this Kansas view, and so do I.[7] Under the assumed facts, Kansas would permit the Compact Administration to write out of the Compact the critical Article IV-D requirement that no new development in Colorado may cause a material depletion in usable flows to Kansas users. Such action would not implement, but rather would amend the Compact. Of course, the Compact Administration was not delegated power to change the Compact. No matter what operational criteria are followed, that is, whether the project is operated in compliance with the Operating Principles, or not, or under appropriately modified Principles, the requirements of Article IV-D must still be met.

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[7] Counsel for Colorado acknowledged during oral argument that Kansas would still have the right to complain about material depletions caused by operation of the Trinidad Project, "even under the Principles." RT Vol. 94 at 8 (March 10, 1992).

Other provisions of the Compact also cast doubt on the "binding" nature of Compact Administration action. Article VIII-H charges the Administration with the responsibility to promptly investigate Compact violations. Its findings and recommendations "may" be reported to the State official charged with the administration of water rights for appropriate action, ". . . it being the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights." Moreover, any Compact Administration procedures involving John Martin are ". . . subject to the approval of the District Engineer in charge of said Project." Article VIII-B(2).

While still maintaining that the State of Colorado and its local conservancy district are bound by the Administration's approval of the Operating Principles, Kansas properly acknowledges that the United States is not. Kansas April 9, 1992 letter. Yet the Kansas train of logic, if indeed it were sound, would lead to precisely the opposite conclusion. Kansas argues that the Arkansas River Compact Administration is an interstate agency created by the Compact; that it is a "federal agency"; that it was expressly delegated certain powers by "federal statute" (i.e., the Compact); that its action in approving the Operating Principles was within its delegated authority, and designed to "implement federal law"; and that violation of a valid regulation is effectively a violation of the statute. Kansas Brief at 5, 10-11; Kansas Supplemental Statement at 10-11. The Kansas argument fails because the Compact Administration was never granted the

authority to bind either Colorado or the United States in the way that Kansas now claims.[8]

The Kansas legal theory on the binding nature of the Operating Principles also runs contrary to the review provisions contained in the Principles themselves. Originally they called for at least one review every ten years. The stated object of such reviews was to amend the criteria to obtain the ". . . optimum beneficial use of water as conditions change, operating experience is gained, and more technical data become available." Jt. Exh. 23, Appendix I at 11. The reference here to "optimum beneficial use" presumably means the same as it does in Article I on Objectives. There it is stated that the project plan provides for: "Optimum beneficial use of the available water for irrigation within the project area consistent with the protection of downstream non-project rights . . . ." *Id.* at 1. The five Kansas conditions shortened the first review period to five years, and added that the Operating Principles be reviewed ". . . to determine the

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[8] Earlier in this case, in ruling on pre-trial motions, I reviewed the history of the Compact negotiations and of its Congressional approval, with respect to the power of the Compact Administration over future federal development. I concluded that ". . . the historical record does not support Kansas' claim that the Compact negotiators intended to give the Compact Administration power to control future Federal operations on the Arkansas River." Report of Special Master re Winter Storage Motions at 16. Article IX of the Compact specifically protects the rights and jurisdiction of the United States over the waters of the Arkansas River basin, provided that the Chief of Engineers is "authorized" to operate the conservation features of John Martin in accord with the Compact, "with such exceptions as he and the Administration . . . may jointly approve."

effect, if any, the operation has had on other Colorado and Kansas water users and the principles amended as necessary." Jt. Exh. 42.

The first required five-year review has now been made. The Bureau found that the Operating Principles, indeed, fail to provide optimum beneficial use for irrigation in the Trinidad Project area; moreover, that modification of the Principles to allow rollover and winter storage would not reduce usable inflow into John Martin Reservoir below without-project conditions. Jt. Exh. 23 at 55. Yet the arguments now advanced by Kansas would give the State of Kansas an absolute veto over any modifications of the Operating Principles.

During oral argument, counsel for Kansas stated:

> "If any amendment [to the Operating Principles] is to be made, it is to be made by the Arkansas River Compact Administration. But until that amendment is made, they are in place and binding." RT Vol. 94 at 27 (March 10, 1992).

If a proposal to modify the Operating Principles were to be put before the Compact Administration, Kansas asserts that each State would hold an "absolute right to veto." Kansas Supplemental Statement at 10.

Kansas claims that its position is supported by Supreme Court decisions in the Pecos River litigation. *Texas v. New Mexico*, 462 U.S. 554, 77 L.Ed.2d 1, 103 S.Ct. 2558 (1983); 482 U.S. 124, 96 L.Ed.2d 105, 107 S.Ct. 2279 (1987). This argument is based in part on the fact that the Pecos River Compact uses the same language regarding findings made by the Pecos River Commission that is used in the Arkansas River Compact for findings made

by the Arkansas River Compact Administration.[9] These decisions, however, do not have the effect Kansas claims for them.

To begin with, the Pecos River Compact gives its Commission specific authority to make findings as to the deliveries of water at the New Mexico-Texas state line, and depletions caused by man's activities in New Mexico. Article V(d)(5),(6), Kansas Brief, Appendix, Item 2. Pursuant to this authority, the Pecos River Commission adopted as "findings of fact" a set of figures showing a cumulative shortfall at the state line of 53,000 AF over the period from 1950 to 1961. *Texas v. New Mexico*, 462 U.S. at 561. Although the Supreme Court accepted these findings, there is nothing to suggest that the Court felt required to do so merely because the Commission representatives of the two States had agreed. Kansas' argument in this respect relies on a statement by the Special Master in the *Texas* case to the effect that the Supreme Court "seems" to have regarded the Commission action as "dispositive." Kansas Brief, Appendix, Item 3 at 18. Elsewhere in his Report, however, *id.* at 5-6, the Special Master explains the Supreme Court language on which he relies. An examination of that language reveals that the

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[9] Article VIII-I of the Arkansas River Compact provides:

> "I. Findings of fact made by the Administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of the facts found."

Except for punctuation and the word "commission" in place of "Administration," Article V-(f) of the Pecos River Compact is identical.

Court did nothing more than go along with a unanimous finding of the Commission as to river flow depletions for certain years. *Texas v. New Mexico*, 462 U.S. at 575.

I find no support in the Pecos River decisions for Kansas' assertion that the Court "has accepted the proposition that the States are bound by the unanimous action of an interstate agency within the scope of the Compact it is charged to administer." Kansas Brief at 9. The Compact itself limits Administration findings to prima facie effect. Note 9, *supra*. The Compact is a law of the United States, and "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. at 564. Kansas' present position thus amounts to a claim that the Supreme Court, without saying so, has ruled that the Compact provision permitting it to review findings is unconstitutional. The Court simply did not do that.

Nor do I agree with Kansas' alternative claim that, even if Administration findings are given only prima facie effect, Colorado has come forward with no evidence sufficient to overcome it. There is ample evidence on which a trier of fact could determine that rollover and winter storage at the Trinidad Project are compatible with the standards established by the Compact.

Even if we consider, for purposes of argument, that the action of the Arkansas River Compact Administration in approving the Operating Principles amounts to a finding, that assumption still does not lead to the conclusion sought by Kansas. At best, such a finding would have to be implied, namely, that operation of the Trinidad Project

according to the 1961-64 Studies and the Operating Principles would not violate Article IV-D. But that fact is not disputed. Rather, it is the failure to so operate that is at issue, and there is certainly no finding on this point. It does not follow from the Administration action, assuming that it amounts to an implied finding, that *failure* to strictly observe the Operating Principles, or to operate differently in any way, would necessarily result in a material depletion. That is the finding that would be required to undergird the Kansas position. Yet there is nothing in the Administration's approval to suggest whether or not any other operating principles would constitute a violation. Indeed, in providing expressly for periodic review, the parties clearly contemplated that there might well be acceptable changes.

Going beyond the subject of findings as such, Kansas argues more broadly in its Supplemental Opposition that the *Texas* case holds that unanimous action of the states, accomplished through the Compact Administration, is to be accorded decisive weight, and that it will not be disturbed by exercise of the Court's original jurisdiction. Dictum in the 1983 opinion in that case is cited to the effect that the Court is not disposed to consider the claims of a state having "second thoughts." 462 U.S. at 570-571. It is contended that Administration approval of the Operating Principles constituted the kind of state action which will not be reviewed by the Court.

The language cited by Kansas was only an incidental comment in a case which did not even involve second thoughts. In the face of *nonaction* by the Pecos River Commission, the Court refused to appoint a third tie-breaking member and instead exercised its own original

jurisdiction to resolve the dispute, rejecting New Mexico's contention that the Court could act only to review decisions actually made by the Commission. Indeed, the real lesson in that decision lies in the Court's strong criticism of any situation where a state may create an advantageous impasse by refusing to give its consent. 462 U.S. at 568-570.

Our case is directly analogous to what the Supreme Court held in the *Texas* case. There, Texas and New Mexico made an agreement (the Pecos River Compact), including a requirement that future findings as to river depletion could be adopted only by unanimous vote of the Commission. Here, the Administration approved the Operating Principles, with the five Kansas conditions, including a requirement that future modification based on periodic review could be authorized only by unanimous consent. As a result, we now face the type of impasse condemned in the *Texas* decision. Responding to New Mexico's claim that Texas should be denied relief, the Court said:

> "In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide for an equivalent method of vindicating the State's rights." 462 U.S. at 569-570.

I do not find in the Kansas conditions, or in the circumstances surrounding their adoption, any explicit provision or clear indications that Kansas should have a veto power over changes in the Operating Principles. Rather I conclude, as counsel for the United States urged on the

first day of trial, RT Vol. 1 at 32-33 (Sept. 17, 1990), that Kansas' approval of such changes may not be unreasonably withheld.

D. The Need to Show Material Depletion.

From the outset, development of the Trinidad Project was guided by two general aims, improvement of flood protection and irrigation supplies in the local Trinidad area, and protection against significant depletion of usable downstream flows. Those principles run consistently through the first 1953 Review Report, through the 1956 House Document 325, and through the 1961-64 studies. Jt. Exh. 34 at 2-4, 16-21; Jt. Exh. 24a at 20-21; Jt. Exh. 24b, Appendix A at 7, 71 *et seq.*; Jt. Exh. 42. Even in the final letter from the Kansas Governor in which he approved the amended Operating Principles, and removed any further Kansas objection to the project, he characterized Kansas' concern as follows:

> "I appreciate the consideration given by the Bureau of Reclamation and the Purgatoire River Water Conservancy District to the concern of the State of Kansas that the operation of the proposed Trinidad Project not adversely affect the volume of water flowing into John Martin Reservoir." Jt. Exh. 45.

Insofar as Kansas is concerned, the desired protection is established in Article IV-D of the Arkansas River Compact. New dams and reservoirs in Colorado are permitted, provided the flows of the Arkansas River are not materially depleted in usable quantity or availability for use in Kansas. Kansas was never intended to benefit from the Trinidad Project, but rather only to be protected

against material depletions. Jt. Exh. 23 at 20; RT Vol. 18 at 119-20 (Oct. 23, 1990). The Operating Principles were not intended as an end in and of themselves, but were designed to meet those Article IV-D requirements. RT Vol. 18 at 119 (Oct. 23, 1990). They were not calculated to provide Kansas with additional water. Project benefits were to belong to the local Trinidad area, and that area alone paid the full local share of project costs. Jt. Exh. 39. The Bureau wrote in its 1988 Report:

> "Nowhere in either the Operating Principles or the Project history is there any suggestion that downstream users are entitled to any water supply benefits from the Project." Jt. Exh. 23 at 20.

Kansas' expert witness Spronk also testified:

> "Special Master: Were the Operating Principles designed also to provide any benefit from the Trinidad Project to downstream users and particularly to the inflow into John Martin?
>
> "The Witness: From my review of the documents, I do not believe that the project was meant to benefit downstream users. However, there was a grave concern on behalf of downstream users that it not cause any detriment either. And as a result, the Operating Principles are meant to carry out, I think, that protection to downstream users." RT Vol. 18 at 119 (Oct. 23, 1990).

If, for purposes of argument, however, it is assumed as Kansas claims that the Administration's motion constituted Compact action authorized by Article VIII-B, it still does not follow that Kansas has a separate right to enforce the Operating Principles apart from showing a

material depletion. Valid action by the Compact Administration must implement the Compact. In this situation, that means Compact Article IV-D prohibiting material depletion. The States both understood in 1980 that the focus of any Compact violation had to be on material depletion. The investigation authorized by the Compact Administration in 1980, on the basis of the Kansas complaint, was to determine whether the Trinidad operation had "materially depleted" the flows of the Arkansas River. Jt. Exh. 88 at 4.15; RT Vol. 18 at 113-15 (Oct. 23, 1990).

I conclude that the operation of Trinidad Reservoir is subject to the Article IV-D prohibition against material depletion of usable flows. While the Operating Principles were expected to provide that protection, it is not enough to show that they were not fully observed, if the object is to establish a Compact violation. It is the actual operation of the Project that counts, and whether such operation has caused a material depletion.

E. Reliance Upon Average Flows.

The final issue raised by the Kansas evidence and legal arguments is whether average flows can be used to judge compliance with downstream obligations. The Kansas showing of depletions, of course, was tied to its legal theory that it needed to show only a violation of the Operating Principles. As discussed earlier, Spronk calculated depletions during the 1979-84 period based on the difference between actual inflow into John Martin Reservoir during any given month and the inflow that would have occurred, absent any violation of the Operating

Principles. He did not offset such depletions by months in which flows were greater than expected, although he acknowledged that stored water in John Martin could indeed buffer the impact of any depletion if the question were one of injury to Kansas users. RT Vol. 18 at 72 (Oct. 23, 1990). So long as water was available to Kansas from John Martin storage, he agreed that any injury could be "mitigated by the accretions that occur after depletion occurred; or visa versa if there is accretion before the depletion." *Id.* Apparently he made some analysis of the times when the conservation pool in John Martin spilled or was empty, but he offered no details and presented no showing of injury. *Id.*

As a matter of law, in an original action to enforce the Compact in this situation, Kansas must show a material depletion under Article IV-D. Its evidence on depletions was not calculated to do this, and is therefore legally deficient.

Rejection by Kansas of the use of any averages is also contrary to the way the project was viewed as it was being developed and evaluated. Certainly Kansas understood that Trinidad Reservoir, planned in part for conservation, would alter the flow regimen of the Purgatoire River. That is the nature of such a dam, to store water and release it later. The 1961-64 studies were aimed at quantifying such downstream impacts. The 1925-57 study period was judged to be indicative of future conditions. Jt. Exh. 24a at 13. Results were displayed in annual increases and decreases in flow due to the project, resulting in a net average annual increase of 400 AF. *Id.* at 22, Table 8. This average included 21 years in which the project caused an increase in flows into John Martin, and

14 years of decrease. When compared to without-project conditions, the Bureau of Reclamation concluded that the project would increase inflow in 16 of the driest years, and decrease inflow into John Martin during 8 of the 12 wettest years. Jt. Exh. 23 at 26. The largest depletions shown in the 1961-64 studies occurred when John Martin Reservoir would spill, and therefore ". . . would not reduce the usable water. . . ." *Id.* at 28.

Kansas' expert witness Spronk acknowledged that the documents which Kansas had in hand when it gave approval to the project showed average annual impacts. RT Vol. 18 at 120-21 (Oct. 23, 1990). He could point to no occasion when Kansas indicated that the 1961-64 studies were inaccurate or had improperly analyzed impacts. *Id.* at 96-98. I have found no evidence that Kansas did not evaluate the project on the basis of average impacts. The Bureau of Reclamation found that "[b]oth the State of Kansas and the Arkansas River Compact Administration based their approval of the Trinidad Project on the 1961 and 1964 Studies. . . ." Jt. Exh. 23 at 28.

Kansas properly makes the point that the use of averages may sometimes be inappropriate. Water withheld only to be delivered long after it is needed may not mitigate injury. Article IV-D of the Compact protects not only the quantity but also the "availability" of water against material depletion. However, it is clear here that Trinidad Reservoir was analyzed originally on the basis of net average impacts on inflow into John Martin, including annual averages, without objection from Kansas.

F. Administrative Claim Question.

Finally, the United States raises the question, apart from a claim based on depletions of flow, of whether a separate cause of action is available under the Compact to enforce compliance with its investigatory and administrative provisions. The United States asks for a specific ruling on whether Kansas has stated such a valid administrative cause of action, and if so, what proof is required to survive a motion to dismiss.

Colorado takes the view that the allegations in the Kansas complaint, which may suggest that Kansas seeks enforcement of the administrative provisions, have been "effectively abandoned." Colorado Response to Supplemental Statements at 8. Kansas responds that it ". . . has not abandoned its position that it is entitled under the compact to good faith compliance by Colorado with the administrative provisions of the Compact." Kansas letter of April 9, 1992.

I do not believe it is necessary to rule on the broad question of whether an administrative cause of action may ever exist under the Compact. What is potentially at stake here was effectively decided in my pre-trial decision on Colorado's Motion to Stay. Decision of Special Master, dated Oct. 21, 1988. Kansas moved for leave to file its complaint in the Supreme Court on December 16, 1985. Colorado filed a brief in opposition arguing that Kansas had not made a reasonable effort to resolve its concerns through the Compact Administration. In response, on March 3, 1986, Kansas filed a new motion in the alternative, either for leave to file its complaint in the Supreme Court, or to compel an investigation by the

Compact Administration pursuant to Article VIII-H. Without argument, the Supreme Court granted the Kansas motion to file the complaint, giving Colorado 60 days within which to file an answer.

Colorado then filed a motion before me to stay these proceedings on two of the issues in the complaint, i.e., post-Compact well development and the operation of Trinidad Reservoir. The motion was based on the alleged failure by Kansas to exhaust its administrative remedies and sought to return those two issues to the Compact Administration. Both States agreed that a "reasonable effort" to proceed first through the Compact Administration was required. However, Kansas argued vigorously that it had done so for some five years, and that it would be futile to proceed further through the Compact Administration. Kansas thus sought judicial not administrative relief. I denied the Colorado motion, concluding that Kansas had indeed made the requisite effort before the Compact Administration, ". . . but because of the inherent limitations in that procedure, the parties reached an impasse." *Id.* at 5. The Arkansas River Compact, like certain others, requires both States to agree. See *Texas v. New Mexico*, 462 U.S. 554, 568 (1983).

The administrative allegations in the Kansas complaint relate to the need to establish an exhaustion of administrative remedies. Once leave to file its complaint was granted by the Supreme Court, Kansas no longer looked for an administrative remedy.

V.

CONCLUSION

There can be little doubt, as a practical matter, that Trinidad Reservoir would not have been constructed if Kansas had continued to oppose the project. Kansas' ultimate approval represented the kind of good faith cooperation that must be forthcoming if the Compact purposes are to be fulfilled. Kansas appropriately recognized the need to improve flood protection and irrigation supplies for the local Trinidad area, so long as its own Compact entitlement was not adversely impacted. Clearly Kansas relied on the 1961-64 studies and the Operating Principles to provide that necessary downstream protection.

It is understandable, therefore, that Kansas felt wronged when Colorado, its local conservancy district, and the United States, from the first year, failed to operate the project in a way that was consistent with the earlier study conditions. While there may be some dispute about the interpretation of the Operating Principles, there is no doubt that the 1961-64 studies did not include the practice of rollover or the storage of winter water outside of the Model right.

It concerns me that the project was not initially operated according to the earlier understandings, especially since the Operating Principles anticipated review, and modification if necessary. Nonetheless, this is a case involving alleged Compact violations, and I believe that such a claim requires a showing that the Trinidad operations caused a material depletion within the meaning of Article IV-D. Kansas has not established, and did not attempt to establish, such injury. This is not to hold that

the operations of Trinidad Reservoir have not caused the requisite injury, but if so, Kansas did not show it. Nor does this decision mean that Kansas may not have a future claim based on Trinidad Reservoir. Colorado is under a continuing obligation to see that the operation of Trinidad Reservoir does not violate Article IV-D.

While not specifically raised by Colorado's motion, the issue of possible amendments to the Operating Principles remains unresolved. The Bureau of Reclamation has recommended that all interested parties work together to amend the Operating Principles to provide for optimum beneficial use in the Trinidad area "consistent with the protection of downstream non-project rights." Jt. Exh. 23 at 57. It further recommends that any proposed amendments be submitted to the State of Kansas for approval, pursuant to Kansas Condition 2, "provided the amended Operating Principles will not result in less inflow to John Martin Reservoir than would have occurred had the Trinidad Project not been built." *Id.* at 57. I concur in these recommendations. I believe that Kansas' review of any changed operating conditions must be based on whether or not such operation will cause a material depletion of usable flows under Article IV-D of the Compact. Kansas may not unreasonably withhold its approval in order to secure benefits from the Trinidad Project.

Accordingly, for the reasons given throughout this decision, and subject to confirmation by the Supreme Court, the Colorado motion to dismiss Kansas' Trinidad claim is hereby granted.

DATED: June 9, 1992

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On June 9, 1992, I served the within **DECISION OF SPECIAL MASTER ON COLORADO'S MOTION TO DISMISS KANSAS' TRINIDAD RESERVOIR CLAIM** by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

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On June 9, 1992, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on June 9, 1992, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons

No. 105, ORIGINAL

In The

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

ARTHUR L. LITTLEWORTH, Special Master

REPORT – PART IV

ORDER GRANTING KANSAS' MOTION TO DISMISS COLORADO'S LAKE MCKINNEY COUNTERCLAIM

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant, UNITED STATES OF AMERICA, Defendant-Intervenor.	)	No. 105 Original October Term, 1985

ORDER GRANTING KANSAS' MOTION TO DISMISS COLORADO'S LAKE MCKINNEY COUNTERCLAIM

(Filed Apr. 20, 1992)

The State of Kansas on September 5, 1991 filed a Motion to Dismiss Colorado Counterclaim which embraced two separate issues. The first issue was designated in the motion as the "Lake McKinney Counterclaim," and relates to Paragraph 5 of Colorado's Answer to the First Amended Complaint and Counterclaim filed December 13, 1989. The second part of the Kansas motion dealt with Paragraphs 6 and 7 of the Colorado Counterclaim, and was described as the "Well Counterclaim." The Kansas motion was thoroughly briefed by both States, and, without objection, I have ruled that oral argument on the Lake McKinney issue is not necessary.

The motion was filed under the guidance provided by Rule 41(b) of the Federal Rules of Civil Procedure. While the Federal Rules of Civil Procedure do not technically control actions within the Supreme Court's original

jurisdiction, the Rules may be taken as a guide in original actions. Supreme Court Rule 17.2.[1] The Kansas motion is based on the grounds that the evidence on the Colorado counterclaim has been completed, and that Colorado has shown no right to relief on the facts and the law. The provisions of Rule 41(b) apply to the dismissal of counterclaims. Rule 41(c); see *Sea-Land Service, Inc. v. Banca de Republica de Dominica*, 697 F.Supp. 253, 257 (E.D. La. 1988). It is not clear, however, that all of the evidence which may bear upon the Well Counterclaim has indeed been submitted, and the ruling on that portion of the motion is reserved at this time. With respect to the Lake McKinney Counterclaim, Colorado did indicate that its presentation of evidence was complete. RT Vol. LXXXVII at 157-160 (May 30, 1991).

Article V-E(2) of the Arkansas River Compact provides: "Water released [from John Martin Reservoir] upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream is authorized by the [Arkansas River Compact] Administration." Colorado has alleged in its counterclaim that State officials in Kansas violated this provision of the Compact by allowing water released from John Martin

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[1] Effective December 1, 1991, the vehicle for the result sought by the Kansas motion would be Rule 52(c) rather than Rule 41(b). However, all evidence on the Lake McKinney matter had been presented and all briefing had been completed before December 1, 1991. Especially since the Federal Rules of Civil Procedure are only a guide for Supreme Court action, it is appropriate to continue to treat Kansas' motion as one governed by former Rule 41(b).

Reservoir upon demand by Kansas to be stored downstream in Lake McKinney in Kansas, rather than being applied promptly to beneficial use.

Under the Compact, water stored in the conservation pool of John Martin Reservoir constitutes a common resource to be released ". . . upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period." Article V-C. The prohibition against storage of such releases prevents either State from demanding more water than currently needed and thereby reducing the amount of water available to the other State. However, since 1980, the common pool concept has in effect been abrogated. Under the 1980 Resolution adopted by the Compact Administration, which currently controls reservoir releases, water stored in the conservation pool of John Martin is allocated into separate storage accounts for each State or its users. Demands for releases are charged against such separate, individual accounts. Jt. Exh. 21, Document 29. Under these circumstances, the prohibition against downstream storage of John Martin water appears to be of less significance. Nonetheless, the provisions of Article V-E(2) remain in the Compact and still constitute an obligation binding on each State.

The undisputed evidence shows that Lake McKinney is a small reservoir located north of the Arkansas River in Kansas that is fed by the Amazon Canal. The reservoir is only about twelve feet deep, and has a current capacity of approximately 3600 acre-feet (AF), although it was larger in the earlier years. Since 1952, the only way for certain Great Eastern Ditch Association lands to receive water

from the Arkansas River has been through Lake McKinney. The outlet capacity from Lake McKinney is less than the inlet capacity, resulting in some inevitable short-term retention of water. RT Vol. XXXII at 134-36 (Nov. 28, 1990).

The Kansas witnesses testified that water released from storage in John Martin Reservoir had not been stored in Lake McKinney in violation of the Compact. RT Vol. XXVII at 102-133 (Nov. 13, 1990); RT Vol. XXXII at 123-155 (Nov. 28, 1990); RT Vol. XXXIII at 4-10, 39, 52-60, 99-100 (Nov. 29, 1990); see also Colo. Exh. 21 at 76; Colo. Exh. 33 at 153-58.

The depositions of the Kansas State Water Commissioner for the Lake McKinney area and of another Kansas Division of Water Resources employee were also admitted into evidence. Both men were involved in the local administration of water rights, one with 40 years of experience, and the other with 27. Their instructions were to release water from Lake McKinney ". . . when John Martin water was being diverted into the Great Eastern;" and when John Martin water was going into Lake McKinney, "reservoir water had to be coming out." Colo. Exh. 21 at 76; Colo. Exh. 33 at 153. It was "common knowledge" that John Martin water was not to be held in storage in Lake McKinney. Colo. Exh. 21 at 76. They checked on it often and knew of no such storage. Colo. Exh. 21 at 76-77; Colo. Exh. 33 at 153, 156-57.

Three Colorado witnesses testified on the subject. The first was George Moravec, who flew over the lake on July 29, 1980. He testified that water was then flowing into the lake from the Amazon Canal, but there was only

a small pool of water in the outlet ditch. RT Vol. LX at 71-73, 76 (April 11, 1991). Photographs taken by Mr. Moravec were also introduced into evidence. Colo. Exh. 489-4. The Compact Administration records show that water from John Martin Reservoir was being released to Kansas from June 9, 1980 through August 9, 1980. Jt. Exh. 18, No. 32, Compact Admin. Report for 1979-80, Appendix B-11, p. 33. The transit time for water to travel from John Martin Reservoir to Lake McKinney is approximately four or five days. RT Vol. XXXII at 133, 137 (Nov. 28, 1990); Vol. LXXXVII at 8-15, 21-24 (May 30, 1991); Kan. Exh. 635. The most favorable view of this evidence for Colorado, therefore, is that water from storage in John Martin Reservoir was in Lake McKinney on the single day when Mr. Moravec saw it, namely, July 29, 1980. However, there was no evidence on how long such water remained there, or that the water was not being "promptly applied to beneficial use," as required by the Compact. Lake McKinney does not have the capacity to store all of the water released from John Martin over that two-month period. Most of such releases either had to be diverted and used by other Kansas canal companies, or pass through the lake.[2]

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[2] Large amounts of water were stored and released from John Martin Reservoir during the June-August period. Demands by Kansas from its storage account in John Martin were 31,067 AF in June, 49,600 AF in July, and 13,411 AF in August. Jt. Exh. 18, No. 32, Compact Admin. Report for 1979-80, Appendix B-11, p. 33. Stateline flows during these months were 25,930 AF, 43,370 AF and 22,750 AF, respectively. *Id.*, Appendix B-8, p. 30.

The second Colorado witness was Thomas A. Williamsen who testified as an expert to a study he had made with respect to releases from John Martin, based upon a review of the Great Eastern records and the records of the Arkansas River Compact Administration. He concluded that ". . . water was being stored in Lake McKinney on July 29, 1980, when the Moravec photos were taken." RT Vol. LXIX at 28-29 (April 25, 1991). He testified further that water was being released from John Martin Reservoir at the same time. *Id.* at 29. But Mr. Williamsen did not testify that it was John Martin water that was being stored in Lake McKinney, and he was not asked that question. Releases from John Martin Reservoir are not the only source of water for the Arkansas River in Kansas, and are not the only source of water for Lake McKinney. There are daily contributions of precipitation, tributary inflows, natural base flow of the river, and irrigation return flows.

Mr. Williamsen said that he also found similar instances in 1967, 1968 and 1980 when water was stored in Lake McKinney at the same time that releases were being made from John Martin Reservoir. But, again, he did not testify that the water stored in Lake McKinney came from storage in John Martin Reservoir. Even so, and with the exception of one instance in 1967 when he testified that water was held over from the end of one irrigation season to the next, he concluded generally that there was ". . . a short period of time between storage and release." RT Vol. LXIX at 30 (April 25, 1991). He said that the water ". . . was released shortly after the storage began." *Id.* at 30. Moreover, there was no evidence that these instances were "allowed" by Kansas officials, or

that Colorado lodged any objection at the time, with either Kansas or the Arkansas River Compact Administration. In prior proceedings in this case, both States acknowledged a responsibility to bring any alleged Compact violations first to the attention of the Compact Administration.

Colorado's final witness on this subject was Dr. Jeris A. Danielson, the Colorado State Engineer. He described a 1980 inspection trip which he had made in Kansas, during which he saw water in Lake McKinney. But on cross-examination he acknowledged that he did not know whether or not it was John Martin water. RT Vol. LXXXVII at 15 (May 30, 1991). In fact, it appears from the Compact Administration records that Dr. Danielson visited Lake McKinney some two or three days before the releases from John Martin could have reached the lake. RT Vol. XXXII at 133, 137 (Nov. 28, 1990); Vol. LXXXVII at 8-15, 21-24 (May 30, 1991); Kan. Exh. 635. Kansas moved to strike Dr. Danielson's testimony in regard to his Lake McKinney observations on the ground that such testimony was irrelevant. I do not find that his testimony helped to establish the Colorado counterclaim, but neither do I believe that it was irrelevant. The Kansas Motion to Strike is denied.

Reviewing all of the evidence and the briefs of counsel, I find that Colorado has not established a Compact violation on the part of Kansas officials for allowing the storage of John Martin water in Lake McKinney instead of applying it "promptly to beneficial use."

Kansas has advanced one additional argument in support of its motion. The argument is not necessary to

this decision, but my observations may be helpful for the future. Kansas maintains that any water released from the separate Kansas storage account under the 1980 Resolution was not water released from conservation storage, and hence could not cause a violation of Article V-E(2), even if it were stored in Kansas. This argument presupposes that Article V-E(2) of the Compact is limited to the definition of "conservation storage" which is found in the 1980 Resolution. I do not agree with that interpretation. The Compact simply refers to "releases of stored water," as well as to releases of river flow. Article V-E(1). The Compact then requires that such releases must be "applied promptly to beneficial use," unless downstream storage has been authorized by the Compact Administration. Article V-E(2). It seems to me that water which has been released from conservation storage into the separate Kansas storage account under the 1980 Resolution, yet physically remains in John Martin Reservoir, is still water that is "stored" within the meaning of Article V-E.

The States also spent considerable effort in their briefs arguing the standard of proof required for a motion of this kind. That issue may be important later when significant conflicts in the evidence must be resolved. However, it is not a matter that needs to be settled in order to decide the Lake McKinney portion of this Kansas motion.

Subject to confirmation by the Supreme Court, the Kansas Motion to Dismiss Colorado's Lake McKinney Counterclaim is granted.

DATE: April 20, 1992

s/ Arthur L. Littleworth
Arthur L. Littleworth,
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On April 20, 1992, I served the within **ORDER GRANTING KANSAS' MOTION TO DISMISS COLORADO'S LAKE MCKINNEY COUNTERCLAIM** by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

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Denver, Colorado 80202

On April 20, 1992, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on April 20, 1992, at Riverside, California.

s/ Sandra L. Simmons
Sandra L. Simmons

No. 105, ORIGINAL

In The

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

ARTHUR L. LITTLEWORTH, Special Master

REPORT - PART V

ORDER GRANTING KANSAS' MOTION TO DISMISS COLORADO'S WELL COUNTERCLAIM

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant, UNITED STATES OF AMERICA, Defendant-Intervenor.	)	No. 105 Original October Term, 1985

ORDER GRANTING KANSAS' MOTION TO DISMISS COLORADO'S WELL COUNTERCLAIM

(Filed Jul. 31, 1992)

On September 5, 1991 Kansas filed a Motion to Dismiss Colorado Counterclaim which addressed two paragraphs of Colorado's "Answer to the First Amended Complaint and Counterclaim" filed December 13, 1989. Part of the motion related to Paragraph 5 of the Colorado counterclaim and was designated as the "Lake McKinney Counterclaim." That portion of the motion was decided by order dated April 20, 1992.

The remainder of the Kansas motion sought to dismiss Paragraph 6 of the Colorado counterclaim, described in the motion as the "Well Counterclaim." In the April 20, 1992 order, I reserved the ruling on this issue because it was not then clear that all of the evidence on the matter had been presented. However, both Kansas and Colorado, as well as the United States, have now rested their

respective cases in chief, and the motion is ripe for decision.

The Kansas motion was filed under Rule 41(b) of the Rules of Civil Procedure, which allows a court to dismiss a claim at the close of a party's evidence on the ground that, upon the facts and the law, the party has failed to establish a right to relief. The substance of Rule 41(b) is now found in Rule 52(c). Under this rule and its predecessor, a court may weigh and consider the evidence, and resolve conflicts. *Stearns v. Beckman Instruments, Inc.*, 737 F.2d 1565, 1567-1568 (Fed. Cir. 1984); *Ellis v. Carter*, 328 F.2d 573, 577 (9th Cir. 1964); see also *Lemelson v. United States*, 752 F.2d 1538, 1547 (Fed. Cir. 1985, Claims Court Rule 41(b)).

The portion of the Colorado counterclaim which is the subject of this motion reads as follows:

> "6. Subsequent to the approval of the Arkansas River Compact by the United States Congress in 1949, state officials charged with the administration of water rights in Kansas have allowed the construction of wells and have permitted ground water appropriations in Kansas that have materially depleted the usable quantity or availability for use to the surface water users in Kansas under the Compact. Those depletions caused Kansas to make additional demands for releases of water stored in John Martin Reservoir pursuant to the Compact to the detriment of water users in Colorado."

Colorado has introduced a large amount of evidence on post-Compact well development in Kansas, on increases in irrigated acreage in Kansas, and on the

alleged impact of these activities on surface flows of the Arkansas River in Kansas. In the opinion of Duane D. Helton, one of Colorado's chief expert witnesses, such pumping has lowered groundwater levels in Kansas, causing increased seepage from the river, and thus reducing surface flows in Kansas. Colorado characterizes such percolation as "transit losses." RT Vol. 86 at 61-62 (May 29, 1991).

Most of this Colorado evidence, however, is not relevant to the Well-Counterclaim. Rather, it is directed toward other basic issues in the case, such as Kansas' entitlement under the Compact, the appropriate methodology for determining "usable" stateline flows within the meaning of the Compact, and the question of whether any such transit losses are ". . . relevant as an offset to, or mitigation of, any Kansas claim of material depletion caused by post-Compact developments in Colorado after 1980." Colorado's Brief at 22. None of these issues is being decided in this order. The order involves only the independent Colorado cause of action, stated as a counterclaim, that increased river seepage, or transit losses, in Kansas have caused injury to upstream water users in Colorado, in violation of the Compact.

To consider the Well Counterclaim, some general understanding is required of the conditions under which Arkansas River water is stored in and released from John Martin Reservoir. Completed just before the Compact was negotiated, this large Federal reservoir is located on the mainstream of the Arkansas about sixty miles upstream from the Colorado-Kansas state line.

Under the 1949 Arkansas River Compact, a "conservation pool" is established in the reservoir, to be operated ". . . for the benefit of water users in Colorado and Kansas, both upstream and downstream from John Martin Dam. . . ." Article IV-C3. During the winter months, from November 1 through March 31, all water entering the reservoir is stored in the conservation pool, except that Colorado has the right to releases of 100 cfs. Article V-A.

During the summer, defined as April 1 to October 31, no flows may be stored in John Martin Reservoir when Colorado water users are operating under judicially decreed priorities. Article V-B. Under these conditions, Kansas is not entitled to any portion of the river flow entering John Martin Reservoir, but is apportioned the river flow that crosses the state line. Article V-G. Downstream from John Martin, the return flow from Colorado users in the area and occasional tributary inflow contribute to the flow of the river reaching the state line. When Colorado water users are not operating under decreed priorities, all summer flows entering the reservoir are stored, provided that Colorado may demand releases of water equivalent to the river flow up to 500 cfs, and Kansas may demand releases of water equivalent to that portion of the river flow between 500 cfs and 750 cfs. Article V-B.

Under the Compact, neither State is allocated a specific share of the water stored in the conservation pool. Rather, such stored water constitutes a common resource to be released ". . . upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period." Article V-C. Specific release

rates are provided for each State, depending upon the amount of water in storage. *Id.* The only limit, however, on the total amount of stored water that either State may take is the requirement that such water must be applied promptly to beneficial use, unless storage thereof downstream is authorized by the Administration. Article V-E(2). Obviously, it is not a system that encourages restraint in water use, or calling for water only at times when it would be most useful to the crops. Water demanded by the first State to call automatically reduces the supply available to the other. According to Colorado, the result was that "both States generally demanded simultaneous releases at the maximum rates to insure that they received their share of water stored in the reservoir." Colorado's Statement of Each State's Entitlements Under the Arkansas River Compact at 55-56.

The Compact also provides that the storage, releases from storage, and releases of river flow shall be accomplished pursuant to procedures prescribed by the Compact Administration. Article V-E(6). Presumably, this authority is the basis for certain changes effected by a resolution adopted on April 24, 1980.

Entitled "Resolution Concerning an Operating Plan for John Martin Reservoir," Jt. Exh. 21, Document 29, this resolution substantially modifies the method of operating John Martin Reservoir. The common pool concept is abandoned in favor of allocating specific State shares in the stored water. The preamble to the resolution recognizes that ". . . because of changes in the regime of the Arkansas River, the present operation of the conservation features of John Martin Reservoir does not result in the most efficient utilization possible of the water under its

control." *Id.* The Compact Administration then goes on to find that the Operating Plan which establishes individual storage accounts does result in a more efficient utilization of water, and that the provisions of the new Operating Plan are permitted by and are in compliance with the Compact.[1]

Under the 1980 Operating Plan, 40% of the stored water goes into a separate "Kansas account," while 60% is divided in varying shares among the nine Colorado canal companies located within Colorado Water District 67. Section II-D(2)(3). As to releases of water from these accounts, the Operating Plan provides:

> "Kansas and the various Colorado ditches may demand the release of water contained in their respective accounts . . . at any time and at whatever rates they desire." Section II-E(1).

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[1] In its Pre-trial Statement, at pages 165-166, Kansas took the position that:

> ". . . while Kansas believes that the 1980 Resolution results in a more efficient operation of John Martin Reservoir . . . the resolution is an administrative rewriting of Article V of the Arkansas River Compact and thus is *ultra vires* and legally void *ab initio*."

It may be that this is the Kansas position only if the 1980 Resolution is considered as an accord and satisfaction of all Kansas claims against Colorado. See Colorado's Brief at 19. In any event, the 1980 Plan has remained in operation continuously since its adoption. Kansas has not exercised its right to terminate it by giving notice on or before February 1 of any Compact year. See 1980 Resolution, Section VII-A. Moreover, during the trial, witnesses for both States supported the continuation of the Plan.

The 1980 Operating Plan also allows three Colorado canal companies, namely, Amity Mutual Irrigation Company, Fort Lyon Canal, and Las Animas Consolidated Canal Company, to store certain "other water" in John Martin Reservoir. Section III-A, B, C. The permitted storage consists of water which Amity could otherwise divert from the Arkansas River and store in the Great Plains Reservoir system, and water which the other two canal companies could store under an approved Pueblo winter storage Plan. Section III-A, B, C.

In exchange for this storage right, the three Colorado canal companies agreed to a 35 percent water charge on all their deliveries into John Martin Reservoir. Section III-D. This 35 percent goes into a Kansas Transit Loss Account. Colorado explains the purpose of this account as follows:

> "The purpose of the Kansas Transit Loss Account was to ensure that releases from the Kansas Account upon demand by Kansas were satisfied by 'an equivalent in Stateline flow.' *See* Arkansas River Compact, Art. V-E(3). During the 1970's, the Compact Administration did not always release sufficient water from John Martin Reservoir to satisfy the releases to which Kansas was entitled by an equivalent in Stateline flow. *See* Transcript, Vol. LXXXIV (May 24, 1991) at 105 (testimony of D. Helton). The Kansas Transit Loss Account was created to address the problem." Colorado's Brief at 16.

Releases of stored water from the Kansas Account are measured at the state line, and transit losses between John Martin and the state line are made up from this Kansas Transit Loss Account. Section II-E(4).

If such losses exceed the amount in the account, the deficit is made up out of future contributions from the 35 percent storage charge. If, however, during any compact year, the transit losses are less than the amount in the Kansas Transit Loss Account, then the excess is transferred 11/35ths into the Kansas Storage Account, and 24/35ths into the storage accounts of the Colorado Water District 67 ditches. Section III-D; Colorado's Brief at 17.

Colorado's evidence in support of its Well Counterclaim is based solely upon operation of the 1980 Resolution and Operating Plan. In terms of timing, the evidence was limited to the period from 1980 to 1990. RT Vol. 115 at 30 (May 22, 1992). Colorado's sole expert witness on the issue was Duane D. Helton.

It is the Colorado position, supported by the testimony of Mr. Helton and certain exhibits, that the development of post-Compact wells in Kansas has reduced the usable flow of the Arkansas River in Kansas by causing increased seepage or transit losses; that this increase in transit losses has resulted in increased demands by Kansas against its storage account in John Martin; and that increased storage releases to Kansas have required additional releases from the Kansas Transit Loss Account, thus reducing the amount of surplus in the Transit Loss Account, 24/35ths of which would otherwise be distributed to Colorado users. RT Vol. 86 at 135-38 (May 29, 1991); RT Vol. 115 at 30-31 (May 22, 1992); Colorado Brief at 13-15, 17. In analyzing these arguments, it is important to remember that the Transit Loss Account is a creation of the 1980 Operating Plan. There is no such account in the Compact itself.

Colorado did not initially quantify its alleged loss, and the Kansas motion was based partially on that omission. In a later segment of the trial, however, over Kansas' objection, Colorado attempted to meet this argument through further testimony from Mr. Helton. He testified to additional seepage losses in Kansas from 1980 to 1990, over and above average losses from 1950-69. RT Vol. 115 at 34-36 (May 22, 1992). That added testimony is still insufficient to prove the amount of Colorado's claim, but there is a far more basic flaw in the Colorado position. The Colorado claim rests upon the allegation, as stated in the counterclaim, that Kansas made "additional demands" for releases of water stored in John Martin, thereby depleting the Transit Loss Account and the surplus otherwise available to Colorado. Colorado Counterclaim, Para. 6. However, there were no such additional or increased Kansas demands for stored water.

After 1980, Kansas had its own storage account in John Martin Reservoir. It had a right to call for all of the water stored in its account, and it did so. The 1980 Operating Plan did not place any limits on the amounts or frequency of the Kansas calls. The record is replete with evidence that users in both Colorado and Kansas generally take all the river water that is usable and legally available during the irrigation season. There is no support in the record for the notion that Kansas users would not have taken all the water available in the Kansas Storage Account even if transit losses in Kansas had been less.

Theoretically, in the years before the 1980 Operating Plan, the amount of usable surface flow in Kansas might have influenced its draws upon the conservation pool in

John Martin, which then was a common resource for the two States. However, Mr. Helton testified that during the 1970s any increased percolation in Kansas would not have affected its use of conservation storage, and that Kansas would have called for the release of all such water without regard to transit losses. RT Vol. 115 at 33-34 (May 22, 1992). And before the 1970s, Mr. Helton testified there was not really any large impact from wells in Kansas. RT Vol. 115 at 33 (May 22, 1992). Several times Mr. Helton indicated that "without" the 1980 storage account plan, Kansas' draft against conservation storage would have increased in the later years. RT Vol. 86 at 138 (May 29, 1991); RT Vol. 115 at 30, 31 (May 22, 1992). But, of course, that testimony does not establish the counterclaim. The evidence supporting Colorado's Well Counterclaim depends upon the existence of the 1980 Operating Plan, and the sharing of the surplus in the Kansas Transit Loss Account which was thereby created.

The 1980 Operating Plan requires both States to do their utmost to achieve maximum beneficial use of the stored water, including ". . . calling for deliveries of Kansas account water during reasonable and favorable river conditions." (Section II-E(5). There is no Colorado evidence that Kansas failed to meet its obligations. Moreover, when transit losses are ". . . deemed by the Colorado Division Engineer to be excessive," he is required to so advise the receiving entity. Section II-E(5). Again, Colorado presented no testimony on this point.

During the most recent segment of the trial, Mr. Helton was questioned concerning the impact of post-Compact well development in Kansas ". . . on its demand for releases from John Martin Reservoir." RT Vol. 115 at

27 (May 22, 1992). In response, Mr. Helton presented estimates of increased river seepage in Kansas for each year from 1980 through 1990, compared to the 1950-69 average. RT Vol. 115 at 34-36 (May 22, 1992). However, there was no tie-in to any "increased" demands on Kansas' storage account, nor quantification of any impact upon the Transit Loss Account or upon any surplus lost to Colorado. Indeed, there was no evidence that any surplus existed at all.

I find, therefore, that Colorado has not shown additional demands by Kansas for releases against its storage account, resulting in loss to Colorado users of surplus water in the Transit Loss Account.

Finally, there is considerable argument in the briefs concerning the nature of the 1980 Resolution, and whether it is being or can be used as an affirmative defense or to establish an accord and satisfaction or estoppel. None of that argument, however, is relevant to the limited question whether Colorado has proved its Well Counterclaim. That claim is based upon actual operations under the approved 1980 Operating Plan. If that Plan has broader implications in this case, no such issues are necessary to a decision on the Kansas motion, and they are not decided herein.

Subject to confirmation by the Supreme Court, the Kansas Motion to Dismiss Colorado's Well Counterclaim is hereby granted.

DATED: July 31, 1992

/s/ Arthur L. Littleworth
Arthur L. Littleworth,
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On July 31, 1992, I served the within **ORDER GRANTING KANSAS' MOTION TO DISMISS COLORADO'S WELL COUNTERCLAIM** by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

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On July 31, 1992, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on July 31, 1992, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons